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5. 2943

No. 14803

United States
Court of Appeals
for the Ninth Circuit

ALFIO BATELLI,

Appellant.

vs.

KAGAN & GAINES CO., INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-11-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

SYDNEY S. FINSTON,
1680 North Vine Street,
Hollywood 28, California.

Attorney for Appellee:

SCHWARTZ & ALSCHULER,
9441 Wilshire Boulevard,
Beverly Hills, California.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16770-HW

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

COMPLAINT FOR DAMAGES FOR BREACH OF EMPLOYMENT AGREEMENT

Comes now the Plaintiff and alleges that:

First Cause of Action

I.

Plaintiff is a corporation duly organized and existing under the laws of the State of Illinois with its principal place of business in the City of Chicago, State of Illinois.

II.

Defendant is a resident of the County of Los Angeles and is a citizen of the State of California.

III.

In this suit there is a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

For many years last past Plaintiff has been engaged in the business of manufacturing, repairing and selling musical instruments of all types and by June 30, 1951, Plaintiff had acquired a reputation for dependable and reliable service and expert workmanship.

V.

On or about September 15, 1947, Defendant was employed by Plaintiff on a weekly basis at a salary of Thirty-five Dollars ($35.00) per week as a repairer and maker of string instruments. Defendant worked under the personal supervision of the president of the Plaintiff corporation. Plaintiff expended great effort in training, instructing and otherwise improving the performance of Defendant in his work, and Plaintiff further spent much time, effort and money in advertising and making known to Plaintiff's customers the name and ability of Defendant to the extent that Defendant's services became an integral and valuable part of Plaintiff's business and good will.

VI.

On or about June 10, 1950, Plaintiff and Defendant entered into a written employment agreement, copy of which is attached hereto and marked Exhibit "A" and by this reference incorporated herein as a part hereof. Under the terms of said agreement, among other things, the parties agreed that the Defendant would be employed by the

Plaintiff for a period of five (5) years as a repairer of string instruments and all other duties attendant upon said type of craftsmanship, it being further agreed that said services by Defendant were to be performed at such place as may be designated by the Plaintiff. It was further agreed that said services were to be rendered exclusively to the Plaintiff and that in the event either party desired to terminate said agreement, such termination could be effected by the [3] service of a ninety-day notice in writing, said notice to be served at the place designated in said written agreement.

VII.

Following the execution of the aforementioned written agreement Defendant continued in the employ of Plaintiff until June 30, 1951.

VIII.

Defendant breached his agreement with Plaintiff in that he willfully failed and neglected to comply with Paragraph 3 of said agreement, to wit: Defendant did not serve Plaintiff with ninety-day notice of termination, but on the contrary, on June 30, 1951, Defendant orally requested Plaintiff's permission to leave for Europe for the purpose of bringing Defendant's family back with him to the United States and that Defendant would return to work within five or six weeks from his departure. Defendant at no time thereafter notified Plaintiff by writing or otherwise that Defendant would not return to work for Plaintiff nor at any time there-

after did Defendant communicate with Plaintiff in any manner to the present date.

IX.

During the six-week period of time following Defendant's leaving Plaintiff's employ for the Defendant's stated purpose of going to Europe, Plaintiff informed its customers that work on their instruments would be temporarily delayed until Defendant returned; Plaintiff finally found it necessary to return to customers their instruments because Plaintiff was not in a position to perform the work by reason of the fact that because Plaintiff expected Defendant to return when he had promised he would, Plaintiff made no effort to replace Defendant until several months had elapsed, so that as a direct and proximate result of Defendant's wrongful breach Plaintiff suffered great and serious damage to its business, all to [4] Plaintiff's damage in the sum of Fifteen Thousand Dollars ($15,000.00), no part of which has been paid.

Second Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this reference adopts the same as though fully set forth herein.

II.

Defendant breached the aforementioned written agreement, and in particular, Paragraph 2 thereof,

in that between June 10, 1950, and June 30, 1951, the exact dates being unknown to Plaintiff, Defendant did not render his services exclusively to Plaintiff, but on the contrary, Defendant manufactured violins and sold them without the knowledge and consent of Plaintiff and retained for his own account the moneys Defendant received for said instruments, all to Plaintiff's damage in the amount of Fifteen Hundred Dollars ($1500.00), no part of which has been paid.

Third Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this reference adopts the same as though fully set forth herein.

II.

While in the employ of the Plaintiff and within three years last past Defendant willfully appropriated goods and materials belonging to the Plaintiff and sold said goods and materials which Defendant fabricated into string instruments for his own account, without the knowledge or consent of Plaintiff, all to Plaintiff's damage in the amount of Fifteen Hundred Dollars ($1500.00), no part of which has been paid. [5]

Fourth Cause of Action

I.

Plaintiff repeats and realleges Paragraphs I to VII of the First Cause of Action and by this ref-

erence adopts the same as though fully set forth herein.

II.

While in the employ of the Plaintiff and within three (3) years last past Defendant sold string instruments belonging to the Plaintiff and willfully failed and refused to account to the Plaintiff for all moneys received by Defendant.

Wherefore, Plaintiff prays judgment of the Court as follows:

1. That Plaintiff recover from the Defendant the sum of Fifteen Thousand Dollars ($15,000.00) as general damages.

2. That Plaintiff recover from the Defendant the sum of Fifteen Hundred Dollars ($1500.00) as special damages or in the alternative, that Defendant be required to account to Plaintiff for all sums received by him in the sale by him of Plaintiff's instruments.

3. For interest and costs of suit, and

4. For such other and further relief as the Court may deem proper.

SCHWARTZ AND ALSCHULER

By /s/ BENJAMIN F. SCHWARTZ,
Attorneys for Plaintiff. [6]

EXHIBIT A

This Agreement, made and entered in this first day of June, 1950, by and between Kagan & Gaines Co., Inc., an Illinois corporation hereinafter to be referred to as: First Party, and Alfio Batelli, of Chicago, Ill., hereinafter to be referred to as: Second Party,

1. First Party agrees to employ the Second Party for a period of five years from the date of this agreement, the services of the Second Party to consist of string instrument repairing and all other duties attendant on this type of craftsmanship. All such aforementioned services on the part of the Second Party are to be performed at such place or places as are to be designated by the First Party.

2. Second Party accepts the employment for the term aforesaid, and agrees to render his services exclusively and faithfully to the best of his ability and to the satisfaction of the First Party.

3. Should either of the aforementioned parties be desirous at any time of terminating this agreement, then it shall be the duty of such party to serve the other with three hundred sixty-five days notice in writing, such notice to be served at 228 S. Wabash Ave.

4. Party of the First Part agrees to pay the Party of the Second Part the sum of not less than $75.00 per week.

5. If, because of illness or disability, Second Party is unable for a period of 30 days to render the aforementioned services then the First Party shall have the right to terminate this contract on ten days written notice.

6. Inasmuch as the Second Party is deeply grateful to the First Party for his untiring effort on behalf of the Second [7] Party in helping him to establish himself as a citizen in the United States of America, and whereas the Second Party is anxious to demonstrate such gratitude by his faithful devotion to the enterprise of the First Party, now, therefore, the Second Party does agree for the duration of this contract to utilize his full talents and powers in the enhancement and furtherance of the aforementioned enterprise and furthermore should the Second Party act according to section three of this agreement he hereby promises to do no act of commission or omission which might in any way interfere with the safety and welfare of the aforementioned concern of the First Party.

KAGAN & GAINES CO., INC.,

By ROBERT KAGAN,
President.

/s/ ALFIO BATELLI.

[Endorsed]: Filed May 13, 1954. [8]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16,770-HW

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

ANSWER

Defendant Alfio Batelli answering the complaint admits, denies, and alleges as follows:

As to First Cause of Action

I.

Answering Paragraph IV, denies that plaintiff ever or at all acquired a reputation either for dependable or reliable service or for expert workmanship.

II.

Answering Paragraph V, denies generally and specifically each and every allegation contained therein except that he admits that he did work for plaintiff involuntarily from about the date stated and that he did receive Thirty-five ($35.00) Dollars per week. [9]

III.

Answering Paragraph VI, denies generally and specifically each and every allegation contained

therein, except that he admits that he signed a paper similar to that marked Exhibit "A," but that said paper was never intended by either of the parties to bind either of them, and that both parties so specifically orally stated.

IV.

Answering Paragraph VII, denies generally and specifically each and every allegation therein contained, except that defendant admits that he did work for plaintiff involuntarily until about the time stated.

V.

Answering Paragraph VIII, denies generally and specifically each and every allegation contained therein; denies that he ever or at all breached any agreement whatever; denies that said alleged agreement ever was in fact or law an agreement or that either of the parties ever intended it to be binding on either, or anyone at all.

VI.

Answering Paragraph IX, denies generally and specifically each and every allegation contained therein; denies that plaintiff suffered either great or serious or any damage whatever either to its business or reputation or good will or to anything at all; denies that plaintiff was damaged in the sum of Fifteen Thousand ($15,000.00) Dollars or in any other sum or at all.

As and for a First Separate and Distinct Affirmative Defense

I.

While defendant was working for plaintiff, plaintiff instructed the defendant to work upon inferior and cheap factory-made [10] violins and amateurishly built instruments and to give such violins and instruments the appearance of fine and expensive old instruments so that they could be sold to the public as such.

II.

While defendant was working for plaintiff, plaintiff instructed defendant to create and insert false, fraudulent, and misleading labels into inferior, cheap factory-made violins and amateurishly built instruments so that they would acquire the appearance of authentic creations of old recognized fine masters to enable plaintiff to deceive the public as to the origin of such instruments and to enable plaintiff to sell such instruments as original creations of old recognized fine instrument makers.

III.

While defendant was working for plaintiff, plaintiff instructed defendant to create and insert false, fraudulent, and misleading labels into inferior, cheap factory-made violins and amateurishly built instruments, the labels to contain Italian names of fictitious non-existent makers in order to enable plaintiff to deceive the public as to the origin of such instruments and to enable the plaintiff to sell

such instruments as creations of old Italian masters, who never even existed.

IV.

While defendant was working for plaintiff, plaintiff instructed defendant that when plaintiff would bring a customer to defendant with an instrument for purposes of appraisal by defendant, if plaintiff held the instrument with his, plaintiff's, thumb up defendant was to exalt the value and quality of the instrument regardless of its true value and true quality, and on the other hand if plaintiff held the instrument with his, plaintiff's, thumb down, defendant was to derogate and depreciate [11] the value and qualities of the instrument regardless of its true value and true qualities.

V.

While defendant was working for plaintiff, plaintiff turned over to defendant a number of cheap Czechoslovakian violins, and instructed defendant to transform them into modern, valuable-appearing Italian creations, and to bear the label of defendant as original creator in order to enable plaintiff to deceive the public and in order to pass such instruments to the public as original creations of defendant.

VI.

Defendant protested and refused to obey the instructions outlined in the five previous paragraphs, and when plaintiff insisted upon compliance defendant terminated his association with plaintiff.

VII.

By reason of all the foregoing defendant's termination of association with plaintiff was with good, sufficient, and legal cause.

As to Second Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the First Cause of Action as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all breached any agreement whatever; denies that said alleged agreement ever was in fact or law an agreement or that either of the parties ever intended it to be binding on either of them or on anyone at all; denies that plaintiff was damaged in [12] the amount of Fifteen Thousand ($15,000.00) Dollars or in any other amount or at all.

As and for a First Separate and
Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI, and VII of his first affirmative defense to the first cause of action.

As to Third Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the first cause of action as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all appropriated goods or materials or anything whatever belonging to plaintiff; denies that he ever or at all sold anything belonging to plaintiff for his, defendant's, own account; denies that plaintiff was damaged in the sum of Fifteen Hundred ($1500.00) Dollars or in any other sum or at all.

As and for a First Separate and Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI and VII of his first affirmative defense to the first cause of action. [13]

As to Fourth Cause of Action

I.

Answering Paragraph I, repeats and realleges his answer to Paragraphs IV, V, VI and VII of the

First Cause of Action, as though herein at this point set out verbatim.

II.

Answering Paragraph II, denies generally and specifically each and every allegation contained therein; denies that he ever or at all sold string instruments or anything else whatever belonging to plaintiff while willfully or otherwise failing or refusing to account to plaintiff.

As and for a First Separate and Distinct Affirmative Defense

I.

Repeats and realleges each and every allegation contained in Paragraphs I, II, III, IV, V, VI and VII of his first affirmative defense to the first cause of action.

Wherefore, defendant prays for judgment as follows:

That plaintiff take nothing by reason of his complaint, and that defendant be awarded his costs and disbursements herein.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1954. [14]

[Title of District Court and Cause.]

CROSS-COMPLAINT

Defendant and cross-complainant Alfio Batelli respectfully alleges:

I.

For the sake of convenience and to avoid confusion, cross-complainant is hereinafter referred to as defendant and cross-defendant is hereinafter referred to as plaintiff.

II.

That at all the times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business in the city of Chicago, State of Illinois.

III.

That on or about the 28th day of November, 1952, plaintiff willfully, maliciously, and without reasonable or probable cause, and with intent to vex, harrass, and injure defendant, and to [16] put defendant to cost in and about his defense and to compel defendant to submit to plaintiff's extortionate demands, commenced an action in this court against the defendant for the recovery of Sixteen Thousand Five Hundred ($16,500.00) Dollars upon an alleged contract, almost identical with the alleged contract set forth in the complaint in the instant suit.

IV.

That said prior action bears file number 14787-Y, and the pleadings therein are now in this cross-

complaint, incorporated by reference as though herein at this point set forth verbatim.

V.

That said alleged contract upon which said prior suit was based was not intended by either of the parties to have any binding effect whatsoever upon either of them, and plaintiff well knew and understood this at the time it instituted said prior suit.

VI.

That plaintiff maliciously, and without probable cause, had caused a summons to be issued out of this court bearing file number 14787-Y, as aforesaid, and to be served upon defendant herein, requiring him to appear and answer the complaint therein. Defendant had been obliged to and did appear by attorney and did answer and defend said action. Said action was tried before this court on or about March 30, 1954, and a judgment was duly given, made, and entered by this court in favor of the defendant and against the plaintiff. No appeal has been taken from said judgment and it has now become final and remains in full force and effect.

VII.

That defendant necessarily incurred, in defending said prior suit, attorney's fees and disbursements in the sum of Three Hundred Twenty-eight and 85/100 ($328.85) Dollars. That by reason of the commencement and prosecution of said prior suit [17] defendant was damaged in the further sum of Ten

Thousand ($10,000.00) by way of injury to his credit, standing and reputation, and by way of neglect of his business, and by way of great pain and mental anguish.

VIII.

That in doing the things herein alleged plaintiff had acted maliciously and was guilty of a wanton disregard of the rights and feelings of defendant, and by reason thereof defendant requests punitive damages for the sake of example and by way of punishing plaintiff, in the sum of Ten Thousand ($10,000.00) Dollars.

Wherefore, defendant requests judgment as follows:

(1) For the sum of $10,328.85 as and for compensatory damages.

(2) For the sum of $10,000.00 as and for exemplary and punitive damages.

(3) For the costs and disbursements of this suit.

(4) For such other relief as to the court may appear proper on the premises.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant and
Cross-Complainant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1954. [18]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Plaintiff and cross-defendant answers the cross-complaint herein as follows:

Defendant denies each and all of the allegations generally and specifically contained in Paragraphs III, V, VI, VII and VIII.

Wherefore plaintiff and cross-defendant prays for an Order dismissing the cross-complaint, and for judgment on the complaint as prayed for in the complaint on file herein; and for such other and further relief as to the Court may seem just and proper.

SCHWARTZ & ALSCHULER,

By /s/ BENJAMIN F. SCHWARTZ,
Attorneys for Plaintiff and
Cross-Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 17, 1954. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial in the within Court on the 9th day of March, 1955, before The Honorable Leon R. Yank-

wich, Judge presiding and sitting without a jury in and for the Southern District of California, at Los Angeles, California, and the plaintiff being represented by Schwartz & Alschuler, by Benjamin F. Schwartz, Esquire, and the defendant having been represented by Sydney S. Finston, Esquire, and the Court having heard the testimony of the witnesses for the plaintiff and the defendant having testified in his own behalf, and the Court having examined the documentary evidence and having heard argument of counsel, the Court now makes its Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Kagan & Gaines Co., Inc., is a corporation duly organized and existing under the laws of the State of Illinois [22] with its principal place of business in the City of Chicago, State of Illinois, and is a citizen of the State of Illinois.

2. Defendant is a resident of the County of Los Angeles and is a citizen of the State of California.

3. This suit involves a controversy between citizens of different states and the matter in dispute exceeds the sum of Three Thousand ($3000.00) Dollars exclusive of interest and costs, and this Court has jurisdiction to hear and determine the issues in this cause and to render judgment therein.

4. On September 15, 1947, plaintiff employed defendant as a repairer and maker of stringed in-

struments and said employment was on a weekly basis.

5. On or about June 10, 1950, plaintiff and defendant entered into a written employment agreement, the terms of which were in part as follows:

(a) Defendant was to render services to plaintiff consisting of repairing of stringed instruments and other duties attendant on this type of craftsmanship; such services were to be performed at such place or places designated by plaintiff.

(b) Defendant was to render his services exclusively to plaintiff; either party had the right to terminate the agreement by service of 365 days notice of termination in writing, such notice to be served at the place of business of plaintiff.

(c) Defendant was to receive from plaintiff as compensation for his services the sum of not less than Seventy-five ($75.00) Dollars per week.

6. On June 30, 1951, defendant terminated his employment with plaintiff without cause and without giving plaintiff any notice of such termination either orally or in writing. [23]

7. By reason of defendant's failure to notify plaintiff of defendant's termination of his employment, plaintiff was damaged in its business.

8. During the period of defendant's employment by plaintiff, defendant did not render his services exclusively to plaintiff but did solicit business on his own account and in competition with plaintiff and defendant did make and sell stringed instruments and defendant kept the proceeds of such sales without accounting therefor to plaintiff.

9. During the period of employment of defendant by plaintiff, defendant appropriated goods and materials belonging to plaintiff, which goods and materials defendant fabricated into stringed instruments without the knowledge or consent of plaintiff, as a result of which plaintiff suffered damage.

10. It is not true that plaintiff and defendant in executing the written agreements of employment hereinabove found to have been executed were done so by plaintiff and defendant with the intention that such agreements were not to be binding upon either of the parties.

11. It is not true that defendant worked for plaintiff at any time during his period of employment involuntarily and without his consent.

12. It is not true that plaintiff instructed defendant to create and insert false, fraudulent and/or misleading labels into inferior, cheap, factory-made violins for the purpose of enabling plaintiff to deceive the public.

13. It is not true that plaintiff instructed defendant to falsely appraise in any manner or by any means any musical instruments or to commit any act

to deceive or tending to deceive the public or plaintiff's customers.

14. By reason of defendant's wrongful termination of his employment with plaintiff, plaintiff has suffered general [24] damages to his business in the sum of Three Thousand ($3000.00) Dollars.

15. By reason of the defendant's wrongful breach of the contract sued upon herein, plaintiff has suffered special damages in the sum of Two Thousand Seven Hundred and Fifty ($2750.00) Dollars.

Conclusions of Law

1. This Court has jurisdiction to hear and determine the issues in this cause.

2. The defendant wrongfully terminated his employment by plaintiff in breach of the parties' written agreement with respect to such employment and said termination by defendant was without cause and without notice.

3. As a direct and proximate cause of the defendant's breach of the contract between the parties, plaintiff suffered general damages in the amount of Three Thousand ($3000.00) Dollars and special damages in the amount of Twenty-seven Hundred and Fifty ($2750.00) Dollars, for which the plaintiff is entitled to judgment of this Court.

4. Plaintiff is entitled to recover from defendant its costs of suit.

Dated this 25th day of March, 1955.

/s/ LEON R. YANKWICH,
Judge of the District Court.

Affidavit of Service by Mail attached.

Lodged March 18, 1955.

[Endorsed]: Filed March 25, 1955. [25]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16770-Y

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial in the within Court on the 9th day of March, 1955, before The Honorable Leon R. Yankwich, Judge presiding and sitting without a jury in and for the Southern District of California, at Los Angeles, California, the plaintiff having been represented by Schwartz & Alschuler, by Benjamin F. Schwartz, Esquire, and the defendant having been represented by Sydney S. Finston, Esquire, and the Court having heard the testimony of the witnesses for the plaintiff and the defendant having testified

in his own behalf, and the Court having examined the documentary evidence introduced, and having heard argument of counsel,

It Is Ordered, Adjudged and Decreed That:

1. Plaintiff have and recover from the defendant as and for its general damages herein the sum of Three Thousand ($3000.00) Dollars;

2. Plaintiff have and recover from defendant as and [27] for its special damages the sum of Two Thousand Seven Hundred and Fifty ($2750.00) Dollars;

3. Plaintiff have and recover from defendant as its costs of suit the sum of $.....;

4. Let execution issue.

Dated: This 25th day of March, 1955.

/s/ LEON R. YANKWICH,
Judge of the District Court.

Affidavit of Service by Mail attached.

Lodged March 18, 1955.

[Endorsed]: Filed March 25, 1955.

Docketed and entered March 29, 1955. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Kagan & Gaines Co., Inc., a Corporation, and to Schwartz and Alschuler, Attorneys:

Please take notice that the Defendant, Alfio Batelli, hereby appeals to the Court of Appeals for the

Ninth Circuit from the Judgment entered herein on the 29th day of March, 1955, in favor of the Plaintiff, and against the Defendant, and from the whole and every part of said Judgment.

Dated: This 28th day of April, 1955.

/s/ SYDNEY S. FINSTON,
Attorney for Defendant.

[Endorsed]: Filed April 28, 1955. [30]

In the United States District Court, Southern District of California, Central Division

No. 16,770-Y Civil

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff,

vs.

ALFIO BATELLI,

Defendant.

Hon. Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
SCHWARTZ & ALSCHULER, ESQS., By
BENJAMIN F. SCHWARTZ, ESQ.,
9441 Wilshire Boulevard,
Beverly Hills, California.

For the Defendant:
SYDNEY S. FINSTON, ESQ.,
1680 North Vine Street,
Hollywood 28, California.

Wednesday, March 9, 1955—10:00 A.M.

The Court: Cause on trial.

The Clerk: Case No. 16,770-Y, Kagan & Gaines Co., Inc., vs. Alfio Batelli. Mr. Benjamin F. Schwartz for the plaintiff, and Mr. Sydney S. Finston for the defendant.

The Court: All right, gentlemen, proceed.

Mr. Schwartz: Your Honor, I observe that the defendant and cross-complainant is not in court, and I think we are entitled to have him present.

The Court: I don't know. Did you issue a subpoena to him?

Mr. Schwartz: No, sir.

The Court: Then proceed with your case.

Mr. Schwartz: Very well.

The Court: Of course, the defendant presumably, especially where there is a cross-complaint, is required to be in court, but if he chooses not to be, why, all right. If you want to call him as an adverse witness, I will make the proper order that he be produced.

Mr. Schwartz: I do so ask.

The Court: Let's proceed, and let's not start your case in a lopsided manner by calling the defendant under 43(b), and getting his testimony first, before I hear the main case in chief. Put on your case

in chief by your own witnesses [2*] or depositions, or whatever you have, and when we get the defendant, we will take care of it. I am bearing in mind that the case was continued with the object of securing some depositions, and we will see what the defendant intends to do at the present time. It was continued at the request of the defendant on the ground that they had to take some depositions, or had to have the presence of a special witness, so I assume that the representation was correct and that they were in good faith in asking for the continuance. Maybe they have changed their minds. I don't know. Let's go on. We continued the case yesterday to accommodate counsel. Counsel is here now, so let's start the case, gentlemen.

Mr. Schwartz: The complaint in this action, your Honor, sets forth the contract which is being sued upon.

The Court: Yes.

Mr. Schwartz: And the contract is admitted.

The Court: Yes, I remember the case. This case is similar to the case that was tried before, and it developed at the trial that the contract on which the suit was brought was modified, according to the evidence, and I made a finding to that effect, and gave judgment upon that ground only. I limited myself to the particular facts. Now, I assume you have brought suit under the substituted contract as the facts developed in that case.

Mr. Schwartz: Yes, your Honor. At this time I want to [3] introduce the deposition of Mr. Robert

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Kagan, taken in Chicago, on December 9, 1954, pursuant to notice.

Mr. Finston: I object, your Honor, to the admission of that deposition. I would like to have an opportunity to object to portions of it.

The Court: I do not receive it in toto. The deposition may be received and marked, but it will have to be read unless there is a waiver. Furthermore, in a case of this character I think we might just as well read the questions and answers rather than have you just give it to me and expect me to read it between sessions. If a case is long, I sometimes do that, but I have other things to do between sessions. So the deposition will be received, but the questions will be read and any objections you desire to make will be made.

Mr. Finston: Did you say, your Honor, that the deposition will be received in evidence?

The Court: That is right.

Mr. Finston: Well, I would like to note my objection to its receipt in evidence on the ground that no foundation has been laid for it, and I want the opportunity to object to practically every question in the plaintiff's deposition, in accordance with the Federal Rules of Civil Procedure, Rules 32 and 26.

The Court: I haven't seen the deposition. What is the objection? [4]

Mr. Finston: I am calling your attention, your Honor, please, to Rule 26, subparagraph (e), which reads as follows:

> "Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made

at the trial or hearing to receiving in evidence any deposition or part thereof * * *"

The Court: But that is not the particular point. Let's see how the deposition was taken. Was it taken upon notice?

Mr. Schwartz: It was taken upon notice, your Honor.

The Court: Let me take a look at it.

(The deposition was handed to the court.)

Mr. Finston: May I ask counsel whether this is the deposition that was taken in this case? Is this the deposition that was taken on December 9, 1954, that you are referring to?

Mr. Schwartz: Yes.

Mr. Finston: Thank you, sir.

The Court: Now, what is your objection to this deposition? This seems to be taken on proper notice. It is a deposition of a party, and is more than 100 miles away. I take judicial notice that Chicago is more than 100 miles away from here. Your objections to the specific questions will be considered.

Mr. Finston: But, your Honor, I want the whole deposition not to be received in evidence at this point for the simple reason that I want an opportunity to object to each and [5] every one of these questions.

The Court: I have to make an order identifying the deposition and giving it a number in order to make it a part of the record, but I am reserving to you the right to object to each question as it is asked.

Mr. Finston: Then let the deposition be for identification purposes only, and not to be received in evidence at this point.

The Court: All right.

Mr. Finston: If counsel wants to have it identified, I have no objection, but I have complete objection to the receipt in evidence.

The Court: All right. Change your offer and just say you want to read the deposition, and I will allow you to read the deposition. The record will show that the deposition was taken on notice duly given to the parties, and that no one appeared on the part of the defendant. The certificate of the notary so states, so the deposition may be read.

Under what particular subdivision of the rules did you raise your objection?

Mr. Finston: I have raised my objection under several of the rules, and I refer you first, your Honor, to Rule 26, subdivision (e). May I read it, sir?

The Court: I have it in front of me.

Mr. Finston: In addition to that, the objection is also [6] made under Rule 32.

The Court: 32?

Mr. Finston: Subdivision (c).

The Court: 26 (e) merely says that if the evidence is not proper, the objection may be made to all the questions, but I don't know upon what theory the evidence of a litigant, a plaintiff, is not proper in a lawsuit.

Mr. Finston: How could we determine, your

Honor, whether it is proper or not unless we hear the questions?

The Court: That is right. I am giving you that, but I mean your omnibus objection is not good.

Mr. Finston: Your Honor, I am only objecting to the receipt of the whole deposition in evidence, and I think the objection is good.

The Court: All right.

Mr. Schwartz: I think for the sake of continuity here at this time, I will offer to read in evidence the deposition.

The Court: I think that is better. Then we will understand each other. I think we are talking at cross-purposes. Counsel starts with a chip on his shoulder this morning. I don't know why, when we have been waiting for a whole day on him, and he starts in in a fighting mood when no one has raised a voice as yet. So I think we will do it that way. I did not intend to put it in as a whole, because I said specifically that each question could be objected to. [7]

However, to avoid an omnibus objection which is not good, because there is no reason stated which shows that the deposition of a party cannot be received at any time, reframe your offer, and offer to read the deposition.

Mr. Schwartz: I offer to read in evidence, your Honor, the deposition of Mr. Robert Kagan on behalf of the plaintiff, which deposition was taken on December 9, 1954, and which deposition was taken on notice.

The Court: Put in the date of the notice and what was stated by the notary. Just read what was given. If counsel is going to become technical, I will become technical, too.

Mr. Finston: Your Honor, I am going to waive the formality.

The Court: No, I will not allow you to waive it. Not now.

Mr. Finston: My objection, sir, was not to the formality.

The Court: Listen, I have ruled upon the objection, and the whole thing will be read now, with the certificate and everything.

Mr. Schwartz: May I have the original deposition, your Honor?

The Court: Yes. The seal will be broken, and the original deposition will be used.

Mr. Schwartz: May I at this time, your Honor, also offer to read in evidence the testimony of the same witness, Robert [8] Kagan, which was taken by deposition in Chicago on February 5, 1954, pursuant to notice?

Mr. Finston: I am sorry, sir.

The Court: Let's have one at a time. Let's read the first one first.

The Clerk: Has it been filed already?

Mr. Schwartz: I will read it from the copy. That is all right. Don't bother.

The Court: There are two cases of the same name. It may well be they were filed in the other case.

Mr. Schwartz: "Robert Kagan, a witness, called in plaintiff's behalf,"——

Mr. Finston: May I interrupt, your Honor? May I have the very first page read?

The Court: Yes.

Mr. Schwartz: (Reading):

"In the District Court of the United States, in and for the Southern District of California, Central Division

"No. 14787 T

"KAGAN & GAINES CO., INC., a Corporation,

"Plaintiff,

"vs.

"ALFIO BATELLI,

"Defendant. [9]

"Continued deposition of Robert Kagan,"——

Mr. Finston: Just a moment. I object to the use of the word "Continued," the first word in the deposition.

Mr. Schwartz: I will stipulate to strike the word "Continued."

Mr. Finston: Thank you.

Mr. Schwartz (Continuing):

"——on behalf of plaintiff, was taken at the office of Manuel J. Robbins, 39 South LaSalle Street Chicago, Illinois, at the hour of ten o'clock a.m., on December 9, 1954, pursuant to Notice, before Rose

Finsky, a Notary Public in and for the County of Cook and State of Illinois.

"Present:

"SCHWARTZ and ALSCHULER, By
"MR. MANUEL J. ROBBINS,
"Appearing for Plaintiff:

"No one appearing for defendant.

"ROBERT KAGAN

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:"——

The Court: I think the record should also show that after notice of the taking of the deposition was given, the [10] defendant filed a motion on November 26th to vacate the notice, and also a request that the deposition be taken on interrogatories; that the motion was heard by this court, and was denied, and the court ordered the deposition to be taken orally and not by interrogatories. I just wanted to make the record straight.

Mr. Schwartz: Thank you, your Honor. (Continuing reading):

"Q. Will you state your name, please?

"A. Robert Kagan.

"Q. You are the same Mr. Kagan who is the plaintiff in this case?

"A. Yes, sir.

"Q. And are you the same Mr. Kagan who pre-

(Deposition of Robert Kagan.)

viously testified in a deposition on behalf of the plaintiff taken at ten o'clock a.m., on February 5, 1954?"

Mr. Finston: Just a moment. I am going to object to that question as being immaterial, irrelevant and incompetent. I don't know what the question means. The question is whether this man is the same Mr. Kagan who previously testified in a deposition on behalf of the plaintiff taken more than a year ago.

The Court: The objection is overruled. It is an identification question only.

Mr. Schwartz (Continuing reading): [11]

"A. Yes, sir.

"Q. You are now appearing for a further deposition pursuant to a Notice sent by attorneys Schwartz and Alschuler, from California?"

Mr. Finston: I am going to object to that question on the same ground. I don't know what the expression "further deposition" means. There was only one deposition taken.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. You previously testified that a contract of employment was prepared for you between Kagan & Gaines Co., Inc., and Alfio Batelli, the defendant, on or about June 1, 1950, is that correct?"

Mr. Finston: Just a moment. Now, I am going to object to that question as being immaterial, irrelevant and incompetent. It deals with some con-

(Deposition of Robert Kagan.)

tract that is not at all within the issues of this case. It has absolutely no bearing on the issues of this case, and it is totally immaterial.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. What were the events leading up to it?"

Mr. Finston: I object to that question, your Honor, for the same reasons. The question deals with a contract not [12] in suit.

The Court: The objection is overruled. The record in the prior case shows that there were negotiations carried on, and one contract was substituted for the other. In fact, counsel now overlooks the fact that he was the one who brought in the question of the contract that had been abandoned, and that he won the case on that point. I don't want any argument. I am making a statement for the record.

Mr. Schwartz: May I state further for the record, your Honor——

The Court: I beg pardon?

Mr. Schwartz: I should like to state further for the record that when Mr. Batelli's deposition was taken by me, pursuant to—I don't recall now whether stipulation or notice, but he was represented by Mr. Finston at that deposition in my office on April 10th——

The Court: Just a minute. Let's not go into that. There may be good grounds for objecting to bringing in the contents of the other deposition. You may ask the witness whether on certain other

(Deposition of Robert Kagan.)

occasions he so testified, in order to shorten or to point up the question about which you are talking.

I am merely ruling on the facts. I take judicial notice of my own acts. A previous action was brought and was decided in favor of the defendant on a point raised at the time that [13] the contract sued on was abandoned, and another one was substituted.

In view of that fact, of which I take judicial notice because my findings so state, it is material and proper in a case of this nature to show the transactions, and to show what happened to these contracts in the course of their dealings.

That is all I am ruling on. I am not ruling at the present time on anything else, and I don't know how much of the other you are bringing in.

Mr. Finston: Well, your Honor also takes judicial notice of the fact that the prior lawsuit is a matter which was completely adjudicated and a thing of the past.

The Court: That is true, but I am talking about the facts that the evidence disclosed, and the findings so state. Get the other file, and let me have the other file before me. This is a perfect illustration that if you try to give a lawyer a victory upon a narrow ground, he is not satisfied. What I should have done was to allow them—I am sorry now I didn't—to change their pleading, and then you would have had one lawsuit.

Counsel having won it, now he wants me to disregard the file and what was done in the other case

(Deposition of Robert Kagan.)

upon some new theory he may have, which may be correct. But let's get back to the findings in the other case. I wrote those findings [14] myself because I wasn't satisfied with what counsel for either side had produced, and I rewrote them, and I made findings strictly limited to the issue upon which I found.

Here are the original findings. The entire thing was rewritten, and we will see what was found. As I say, the findings were rewritten, and on Government paper, and I wrote them myself, and this is what I find. I am reading from the findings in Case No. 14787-Y, filed on May 5, 1954, paragraph 5:

"On June 1, 1950, Plaintiff and Defendant entered into a written employment agreement, the terms of which were as follows:"

And then I give the terms of the agreement.

"6. On or about June 10, 1950, Plaintiff and Defendant by mutual agreement terminated the agreement of June 1, 1950. The evidence in the record is incomplete and insufficient to warrant the conclusion that the said agreement was or *was not* replaced by another agreement dated June 10, 1950, and/or whether such new agreement was in force at the time of the termination of the employment by the defendant or at the time when this action was instituted.

"For these reasons the court makes no finding on this issue."

So that this very specifically shows that a [15]

(Deposition of Robert Kagan.)

certain agreement was abandoned, and the object of this inquiry is to show what was done after that.

Mr. Finston: Your Honor, may I at this point say something?

The Court: Yes.

Mr. Finston: May we have the file of the previous case introduced into evidence as Defendant's Exhibit 1?

The Court: It may be introduced at the proper time. The file is here.

Mr. Finston: All right. Thank you.

The Court: You haven't presented your case yet, and this is not cross-examination. You cannot cross-examine a deposition.

Mr. Finston: No, sir; except your Honor has been reading from the findings, and I am merely asking that the entire file be introduced in evidence by reference.

The Court: At the proper time, if you want it, it will be. I take judicial notice of my own file, and the file is right here. I had the clerk bring it in.

Mr. Schwartz: Lest Mr. Finston be concerned about it, I will offer by reference the file of the previous case.

The Court: All right. Then the file may be received as Plaintiff's Exhibit 1.

(The file referred to was marked Plaintiff's Exhibit 1, and was received in evidence by reference.) [16]

(Deposition of Robert Kagan.)

Mr. Schwartz: I am reading at the top of Page 3:

"A. I told Mr. Batelli that I was spending an awful lot of money and time"——

Mr. Finston: Counsel, would you mind telling me the page and line?

Mr. Schwartz: Yes, the top of Page 3. It is the answer to the question, "What were the events leading up to it?"

Mr. Finston: I made an objection to that question, your Honor.

Mr. Schwartz: It was ruled on.

Mr. Finston: I don't know whether the court ruled on the objection or not.

The Court: I overruled it.

Mr. Schwartz (Continuing reading):

"A. I told Mr. Batelli that I was spending an awful lot of money and time and making many efforts to make him an American citizen and that if he did not intend to stay I did not want to do all this. I asked him if I did spend all this time and money to make him an American citizen whether he was prepared to sign a contract with Kagan & Gaines Co., Inc., for a period of at least five years.

"He answered that he was very grateful for everything that I was doing for him, that he would work for me for the rest of his life, not only for five years. [17]

"Q. Was a contract of employment ever prepared for Mr. Batelli to be employed by Kagan & Gaines Co., Inc.?

(Deposition of Robert Kagan.)

"A. Yes, sir.

"Q. About when was it prepared?

"A. The last part of May or early June, 1950."

Mr. Finston: Just a moment. If the Court please, as to the last question, "About when was it prepared," may I understand whether the contract pertains to the contract involved in this suit, or the contract involved in the previous suit?

Mr. Schwartz: Let's go on with the examination.

Mr. Finston: Well, if the question pertains to the contract involved in the previous suit, I will object to the question as irrelevant, immaterial and incompetent, and having no bearing whatever under the pleadings.

The Court: The objection is overruled. I have already indicated that the findings in the previous suit showed that there was a contract, and there were modifications, and the object of this inquiry is to supply the very thing that I referred to that was not present there, and that the evidence was uncertain as to what happened to that. That is the finding I made in the case. As I said, I think I made a mistake. I should have allowed the pleadings to be modified, and the case to have gone on, but because we were in the midst of trial, and because I felt we should not take the time to do it we have a second lawsuit, and counsel raises these objections, [18] which he has a right to do, but I also have the right to say that in view of the findings in the prior case the inquiry is absolutely material, because otherwise we will be just as much up in the

(Deposition of Robert Kagan.)

air as we were last time, where I merely found that that contract was abandoned because there wasn't enough evidence to show what became of it.

I still believe in the Rules of Procedure, but sometimes it is not advisable, as this case demonstrates, to decide a case strictly on procedural grounds, as I did the other case. I am sorry now I did it. However, this case is here, and we will hear it on the merits. And we have a cross-complaint, which we did not have in the other case, if I remember correctly. Am I correct on that?

Mr. Finston: Yes, your Honor.

Mr. Schwartz: Yes, your Honor, you are. (Continuing reading):

"Q. What took place at that time?

"A. A bill was presented to Congress through my efforts by Mr. Gold—through my efforts and the efforts of Mr. Gold, the attorney, making Mr. Batelli a citizen. It was to be enacted by Congress and signed by the President. I then had Mr. Gold prepare a contract as per my agreement with Mr. Batelli. I told Mr. Batelli to take the contract home and look it over and study it. He did and came back the next morning and told me that [19] everything was all right and he signed it and gave it to me.

"Q. Was this signed in your presence?

"A. Yes.

"Q. Did this contract provide for any termination provisions?"

Mr. Finston: Just a moment. I object to that

(Deposition of Robert Kagan.)

question as irrelevant, immaterial and incompetent. The contract speaks for itself.

The Court: That is all right. The witness may be examined in regard to a particular clause. I agree that the contract speaks for itself, but the attention of the witness may be called to a particular clause in order to follow it up by other questions. Go ahead. Overruled.

Mr. Schwartz (Reading):

"Q. Was this signed in your presence?

"A. Yes.

"Q. Did this contract provide for any termination provisions?"

Did I read that?

Mr. Finston: I think you had already read that.

Mr. Schwartz (Reading):

"A. Yes. He was supposed to give me ninety days notice prior to expiration of the contract.

"Q. Now, was this the first contract that you executed? [20] A. Yes, sir."

Mr. Finston: Just a moment. I want to object to that on the same ground, that it is immaterial, irrelevant and incompetent and not within the issues framed by this case.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes, sir.

"Q. Did this contract remain in effect?"

Mr. Finston: Just a moment. I am going to object to that question as calling for the witness' opin-

(Deposition of Robert Kagan.)

ion and conclusion. No witness is in a position to know whether any contract remains in effect.

The Court: The objection is overruled.

Mr. Schwartz (Reading):

"A. No, sir.

"Q. Did you have any discussion with Mr. Batelli? A. Yes, sir.

"Q. About when did you have the discussion?

"A. A day or two after the contract was executed and signed by both of us.

"Q. Who was present at that time?

"A. Mr. Batelli and myself.

"Q. Where did this conversation take place?

"A. In my office.

"Q. What did you say and what did he say, if anything? [21]

"A. I told Mr. Batelli I have had a chance to think about this contract carefully and to think about the great expense and effort that I exerted in bringing you to this country and arranging for you to stay here and also the great amount of money that I have spent and that I am going to spend in advertising you and I feel that a ninety-day notice of termination is not much protection to me, and whereas he professed to be willing to work for me for the rest of his life, I thought he would have no objection to signing a contract for a 365-day or a one-year termination clause instead of a ninety-day termination clause.

"Q. What, if anything, did Mr. Batelli say?

"A. He said, 'I am only too glad to change the

(Deposition of Robert Kagan.)

contract because I will never forget what you have done for me and you treated me like a brother and I am willing to work for you for the rest of my life.'

"Q. What, if anything, did you do at that time?

"A. I have asked Mr. Gold to prepare another contract which was exactly the same like the first one except with the change of the termination clause."

Mr. Finston: Just a moment. I am going to object to that question and answer on the ground that it is not the best evidence. The contracts speak for themselves. The question asks the witness for his opinion and his conclusion. [22]

The Court: The objection is overruled. Of course, the new contract will have to be put in evidence, but the fact that such contract contained the clause that they were discussing in connection with it may be testified to. Overruled. Go ahead.

Mr. Schwartz (Reading):

"Q. What did this termination clause contain?"

Mr. Finston: I object to that question, your Honor, on the ground the contract speaks for itself, and this is not the best evidence as to what is contained in a writing.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. This termination clause provided 365 days notice instead of 90 days notice. I received this contract from Mr. Gold. I called in Mr. Batelli in the office and he compared this contract with the contract which he signed a week or so previous and

(Deposition of Robert Kagan.)

found everything satisfactory and he signed the new contract."

Mr. Finston: Just a moment. I am going to object to that whole answer because it is all not responsive to the question. The question is, "What did this termination clause contain," and we have a whole story.

The Court: In the Federal Courts an objection that an answer is not responsive is not good. The Legislature of California has established such a rule, but on the civil side [23] we are not bound by that rule. Go ahead.

Mr. Schwartz (Reading):

"Q. Did you sign it also?

"A. I have also signed the contract.

"Q. Did he sign it in your presence?

"A. Yes, he signed it in my presence.

"Q. When was this contract executed?

"A. About the week after the first one, some time between the tenth and fifteenth of June, 1950.

"Q. I show you Plaintiff's Exhibit 'A' and ask you if that is an exact copy of it?

"A. Yes."

Mr. Finston: May I see that exhibit, please?

The Court: He has not offered it yet. Give the man a chance.

Mr. Finston: But I would like to know what the question pertains to.

The Court: Well, you are not allowed to see an exhibit until he offers it. Go ahead.

Mr. Schwartz (Continuing reading):

(Deposition of Robert Kagan.)

"Q. Now, was this contract ever changed in any way? A. No, sir.

"Q. Is this the contract upon which your present cause of action is based? A. Yes, sir. [24]

"Q. Is this contract in the same condition now as when you signed it? A. Yes, sir.

"Q. Was this contract in any way ever cancelled? A. No, sir.

"Q. Was this contract still in existence during June, 1951? A. Yes, sir.

"Q. Did Mr. Batelli ever repay you for any of the money that you advanced?"

Mr. Finston: Just a moment. The question is totally immaterial. There is nothing in the complaint which sues for any monies advanced by the plaintiff to the defendant.

The Court: I will sustain the objection.

Mr. Schwartz (Continuing reading):

"Q. Did Mr. Batelli work for you the five years as listed in the contract? A. No, sir.

"Q. When did he cease his employment with your Company?

"A. Approximately in June, 1951.

"Q. Did he give you any notice?

"A. None, whatsoever.

"Q. Will you please tell the court what, if anything, took place at that time? [25]

"A. Mr. Batelli came to my office and told me that instead of two weeks vacation he likes to take a longer time in order to go to Italy and bring his family to the United States and wind up his affairs

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in Italy, and of course, although it was quite a strain on our Repair Department, I have agreed for him to take a month off with two weeks pay and we have given him a farewell party and the two weeks pay, in our office. I also told him upon his arrival back I would get him a larger apartment if he will bring his family to this country and I will do everything possible to make his family comfortable.

"I made it very plain to him that he should not stay any longer than four weeks because we have on hand a large amount of unfinished work and work in process and work which would accumulate during the time he was gone.

"Q. What did he say?

"A. He said that I can depend upon his integrity, that he will be back maybe in three weeks, but the most it will take is four weeks as his family already sold some of their possessions and he has all the necessary affidavits and papers to bring them to this country and he will catch up with the accumulated work immediately upon arrival and he again thanked me innumerable times for all that I have done for him. [26]

"Q. Did he in any way mention that he was leaving your employment?

"A. No, sir.

"Q. Did you ever receive any communication from him?

"A. No, sir.

(Deposition of Robert Kagan.)

"Q. Have you ever heard anything at all from him since he left?

"A. No, sir. In fact, later on I found out he never even left this country.

"Q. He gave you no notice at all of quitting?

"A. No. While he is telling me he was making the trip to Italy, his wife was already here in Chicago.

"Q. Did he ever give you any notice that he was quitting?

"A. No.

"Q. Did he ever make any complaints about any working conditions whatsoever?

"A. Never.

"Q. In your previous deposition, Mr. Kagan, didn't you testify that another contract which was executed on June 1st was still in existence at the time Mr. Batelli left your employment?"

Mr. Finston: Just a moment. I certainly object to that question. I don't know what the question means. It is talking about a previous deposition. I know of no previous [27] depositions taken in this case. Anything testified to in the previous deposition is totally immaterial to the issues joined in the pleadings in this case, and no proper foundation has been laid for any evidence of previous depositions.

The Court: The objection is overruled. The object is merely to call attention to certain specific facts. The man is testifying specifically, and there is no portion of the previous deposition offered or

(Deposition of Robert Kagan.)

received in evidence. A witness who has given two depositions may be helped so as to make clear in his mind what is desired in this deposition. Go ahead.

Mr. Schwartz (Continuing reading):

"A. Yes, I did.

"Q. Can you explain to the court?

"A. I have completely forgotten that contract that we made a week later because it was the identical contract except the change of termination date provisions. I turned over all my papers to my attorneys and did not examine the fact that there was another contract made up between a week or ten days after the first one and I did not give it a second thought at that time. I had forgotten about the new contract with the 365-day provision.

"I still say, however, that that contract was signed a few days after the first one and that [28] it was in effect at the time Mr. Batelli left our employment and was never changed and was signed by each of us after a discussion about the termination provisions.

"Q. You brought this action against Mr. Batelli, did you not?

"A. Yes, sir.

"Q. What was your reason for bringing this action?"

Mr. Finston: Just a moment. I object to that question as calling for the witness' opinion and conclusion.

The Court: The objection will be sustained.

(Deposition of Robert Kagan.)

Mr. Schwartz: Your Honor, I think it relates——

The Court: What is that?

Mr. Schwartz: I think it would have reference to the cross-complaint, which alleges malicious prosecution as a ground for a cause of action. May I read the answer, subject to that objection?

The Court: Let's wait and let's see how much is going to be offered. The defendant is not here, and they may not produce him at all. They may rely upon some weakness in this case, as they did in the other, and not go on with the cross-complaint. I can't compel them to go on, so let's wait with that portion of the deposition until there is some evidence to sustain the claim that there was malicious prosecution. Go ahead.

Mr. Schwartz (Continuing reading): [29]

"Q. Now, everything else that you indicated in your previous deposition concerning the expenses that you incurred and concerning your damages, do you hereby affirm said answers?"

Mr. Finston: Just a moment. If it please the court, I object to that question.

The Court: I will have to sustain the objection.

Mr. Schwartz: I am going to offer that deposition anyway.

The Court: What is that?

Mr. Schwartz: I say I am going to offer that deposition anyway, when I get through with this one.

The Court: All right.

Mr. Schwartz: Under the rules, as is provided.

The Court: I don't think you can offer a deposition taken in another case.

Mr. Schwartz: I think, your Honor, under Rule 26(d)(3), the last paragraph.

Mr. Finston: What is that?

Mr. Schwartz: Or, rather, it is 26(d)(4).

Mr. Finston: 26(d)(4), Mr. Schwartz?

Mr. Schwartz: Yes. "* * * when an action in any court of the United States"——

The Court: Just a moment. That was 26 what?

Mr. Schwartz: 26(d)(4),—the last paragraph of (d)(4). [30]

Mr. Finston: Is that the one beginning with the word "substitution"?

Mr. Schwartz: Yes.

The Court: Will you give me the other file again?

(The file was handed to the court.)

The Court: Now, what is your objection?

Mr. Finston: I don't know that an objection is before the court. The last objection I made the court sustained.

The Court: No, they are offering now the entire deposition.

Mr. Finston: Which deposition?

Mr. Schwartz: The first one.

The Court: The first deposition, under this section, which states that when an action is dismissed the deposition may be used by the same parties.

Mr. Finston: Well, I make the simple objection that the deposition is completely inadmissible under

that rule. There is no previous action that has been dismissed here. The previous action was adjudicated on the merits. There are three cases that were decided under that particular rule which Mr. Schwartz has just invoked, and I would like to give the court the three citation of those three cases.

The cases are as follows:

Eller v. Mutual Benefit Health & Accident Association, and the citation is 1 Fed. Rules Decisions at Page 280. The [31] second case is Franzen v. DuPont, etc., and the citation on that one is 146 F. 2d at Page 837. And the third case is Cervin v. Grant, and the citation on that one is 100 F. 2d at Page 153.

Those three cases interpret the particular subdivision that Mr. Schwartz has now invoked. Under those three cases, which I have cited to the court, the previous action was always pending and undisposed of. The implication is clear that when a previous action is finally adjudicated on the merits, no deposition taken in that action either of the party or of a witness is admissible in a subsequent action. Otherwise we would lose our right to cross-examine the witness completely.

Under those three cases, your Honor, any deposition taken in the previous lawsuit is inadmissible.

The Court: Just a moment. Get me 146 F. 2d.

(The book was handed to the court.)

The Court: I don't find anything in this case. Get me these other two cases. I don't find anything

in this case. I don't find anything in the Franzen case. On the contrary, the court said a deposition taken in a prior proceeding before an administrative body was admissible.

Mr. Finston: That is correct, your Honor, but the prior proceeding was not completed, and, if I am not mistaken, if I remember the facts correctly, it was simply transferred to another court for continuation. It had never been finally [32] adjudicated.

The Court: This states:

"The testimony of the witness, Gordon, upon which the trial court largely relied for its findings pertinent to the question of marriage, was introduced at trial by way of a deposition. Gordon had given the deposition in connection with the plaintiff's claim before the Workmen's Compensation Board of New Jersey for compensation under the law of that State for her husband's death. It was so used and became a part of the record in that proceeding to which we have already referred in another connection."

Then they go on and say that that was available for use.

Now, let's look at the other case. In the other case, Eller v. Mutual Benefit Health & Accident Association, the case was still pending.

Let's see what this case in 100 F. 2d says. This Cervin v. Grant does not help much because there the deposition was taken while the case was pending in the State Court, under State rule, and the

only question before the court was whether that deposition was good, and the court held that it could be used.

Mr. Schwartz: Your Honor, I would like to suggest here that this objection probably is no good for the simple reason that I offered in evidence by reference the file in the previous [33] action, and there was no objection made, and the depositions are a part of the file in the previous action, your Honor.

The Court: Of course, technically speaking, the other case terminated in a judgment for the defendant. It was not dismissed. The question then arises if that deposition is admissible at the presen time in view of the fact that the section does say that depositions may be used in those instances.

Mr. Schwartz: My point is in the first case that by judgment the action was dismissed, but, secondly, and the rule here does not say how it shall be dismissed, whether by judgment or a motion. In any case, whether it be by judgment or a motion, there is a judgment of the court, whether based upon a motion, or otherwise, or on findings, but the action has been dismissed, not by the plaintiff for any reason, but by the court's action. The rule itself is open on that. It says, "When an action in any court of the United States or of any state has been dismissed * * *"

The Court: Of course, technically speaking, there was no dismissal because the judgment says that the plaintiff take nothing. It was adjudi-

cated, and said that you were not entitled to recover.

Mr. Schwartz: My point is that I have offered in evidence the file of the previous action by reference, and the depositions are a part of the [34] file.

The Court: The rules of evidence prescribe that we ought to follow the rules which favor admissibility. In view of the fact that the defendant here was given an opportunity to appear, and did not appear at that time, I am going to rule in favor of the admissibility of the prior testimony. There is no rule to the contrary, and not one of these cases are decisive. So there is an opportunity here to have the question ruled on in the Ninth Circuit.

Mr. Finston: I respectfully except to your Honor's ruling.

The Court: You do not have to except to it. I have ruled, and every ruling on evidence is deemed to be excepted to. That has been the rule since 1938, when the rules were promulgated. I will read you the section.

So long as you are becoming technical, I will read you the section which says that exceptions are abolished. Your client not being present, I assume you are not making this for effect on him, but to show that you are making a record.

Now, just a moment. Let's find out. We are getting to be very technical today, so we will follow that procedure. Let's see where the rule as

to exceptions is, and we will read it, and you will see that it is not necessary. Rule 46 says:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes [35] for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Of course, that is the original rule, and it has never been changed. But exceptions to admissibility of evidence are not necessary. If they were necessary, then you are about fifty exceptions behind, because this is the first one you have taken, and you have already had about fifty objections. So I do not want you to be in the position where you are taking the exception the fifty-first time, where you did not take it the first time.

However, the exception will be noted, although it is unnecessary.

Now, let's take a short recess before we go on.

(A short recess.)

The Clerk: Your Honor, before we go on, the former deposition was filed in the other case, and shall we make that as a part of the file in this case as an exhibit?

The Court: No, it is not being offered as an

exhibit. You may give it a number for identification. [36]

The Clerk: Plaintiff's Exhibit No. 2, for identification.

(The deposition referred to was marked Plaintiff's Exhibit 2, for identification.)

The Court: We are not admitting it in toto. Counsel would still have the right to object individually to some of the questions asked, as he has as to the others.

Mr. Finston: May I ask if I understand correctly, the depositions in the previous case have not been admitted in this case as an exhibit?

The Court: No, counsel is going to proceed to read the questions, as he did in the other, and you may have objections to the questions. I have, however, ruled that it is permissible to use it. That is all I have ruled on, that he may use that deposition, or portions of it, as he chooses.

Mr. Finston: I might also say, to clarify the record, if I may, at the time something was said about introducing the file in the former case by reference into this case, it was done when your Honor was reading the findings in the previous case, and the offer was made for the purpose of having the findings in the other case appear in the instant case.

Mr. Schwartz: I made no such stipulation when I offered it.

The Court: I don't think that is material. I have stated the ground. If there are other grounds

on which the ruling may be sustained, such, for instance, as the offer of [37] the file, while those may be available, I am satisfied on the whole that the interests of justice will be best subserved by allowing these questions rather than by excluding them, in view of all of the circumstances that have already been alluded to. I don't want to repeat them.

Mr. Finston: I would like at this point, your Honor, to make the general objection, that the objection to the introduction of the depositions taken on the previous case is on the ground they are all inadmissible and hearsay, and no foundation has been laid for their admission, or any part of them, and I have never had the opportunity to examine or cross-examine in connection with them.

The Court: You chose to absent yourself from the second deposition, at which this question relating to the other was asked. The witness was asked if his damages are the same as given in the other, and I think where the person is not present, that is an objection as to form, and it is as though he had presented the man in summary with the prior testimony as to damages, and said, "Is this correct?" You were not there. That is a question as to form, and the witness may be asked.

As a matter of fact, the Ninth Circuit Court of Appeals has approved the method whereby if you have extensive accounts, you may present a summary and ask the person if that summary correctly reflects what is in the books.

At any rate, I have made the ruling, and I will allow [38] counsel to read from the prior deposition,

subject to individual objections to the questions, as you desire to make them.

As I said, the rules enjoin upon us to favor rules of evidence which allow matters to be gone into, and I know actually of no case since 1938, when the rules went into effect, where a judgment has been reversed on purely a question of evidence. There are some—I could refer to one or two—but those are borderline cases where the balance swung either one way or the other, and the court felt that in the circumstances the admissibility of certain testimony should not be allowed, especially when there was a jury. But I know of no case tried without a jury in which there has been a reversal by the higher court, even upon an erroneous admission.

I am reminded of a statement made by Judge Wilbur in the first three-judge case in which I sat with him, which was an equity case, where objection was made to the introduction of testimony, and he said that the rule is that in equity we will only be governed by evidence that is material. And Judge Garrecht, in a decision he wrote just before he died, said that the new rules carried over into all civil litigation the same rule that applies in equity.

At any rate, I am willing to take a chance on this ruling, should it be reviewed. I thought the point counsel made had the appearance of merit, but the cases he cites are not decisive, and I think there are other reasons why the [39] objection should be overruled. However, I will reserve the right to counsel to object to each question as the question is repeated.

Go ahead.

Mr. Schwartz: This is at the bottom of Page 10, and the answer is:

"A. Yes, sir, they are exactly so.

"Q. In other words, Mr. Kagan, if you were asked those questions"——

Mr. Finston: Now, just a moment. You are reading an answer that the court ruled out. The answer which you just read was ruled out by the court.

The Court: What question?

Mr. Finston: Would you be good enough, then, to read us the question before reading the answer? You started out by saying, "Yes, sir, they are exactly so." That is the answer.

Mr. Schwartz: Mr. Finston, I had started out before to state the question which had been ruled upon before the recess, and now I am reading the answer.

The Court: Read the question again.

Mr. Schwartz (Reading):

"Q. Now, everything else that you indicated in your previous deposition concerning the expenses that you incurred and concerning your damages, do you hereby affirm said answers?" [40]

That was the question that was objected to and ruled on.

Mr. Finston: And I heard the court say, "The objection is sustained."

The Court: No. If I did that, I have been wasting my breath now.

Mr. Finston: I have the note here, your Honor.

The Court: All right. If I said so, I will say it was what we were taught in rhetoric is a lapsus linguae. I did not mean to sustain the objection, so now it will be overruled.

Mr. Schwartz (Reading):

"A. Yes, sir, they are exactly so.

"Q. In other words, Mr. Kagan, if you were asked those questions as indicated in that deposition, would your answers still be the same?"

Mr. Finston: Of course, I have got to object to that question for the same reason, that it is immaterial and hearsay—inadmissible hearsay.

The Court: Overruled.

Mr. Finston: And all the objections previously made.

The Court: Yes. The objections are overruled. I will add further that the court is of the view that in view of the witness' previous testimony, he may be so asked, especially when it relates to amounts of money, and may be asked the general question for the reason that the other side has not availed itself of the opportunity of being present, so it [41] cannot be heard to object that it should be gone into in detail. That is a matter for cross-examination, and is a matter also for objection on the part of the defendant, who did not choose to be present.

Mr. Schwartz: The answer to that question is, "Yes, sir."

Now, counsel at that time offered in evidence as Exhibit A the contract between Kagan & Gaines Co., Inc., and Alfio Batelli. I do not find that docu-

ment with the deposition, and, therefore, your Honor, I am going to offer instead——

The Court: Show counsel that you are referring to the same. If it is the same document, it does not make any difference whether it was identified by the deposition or not. I find that many deposition notaries are rather careless in matters of that character. I don't know whether it is the fault of the attorneys, who are rather easy-going in their methods, or the fault of the notaries. At any rate, you may show counsel the document you seek to offer.

Mr. Schwartz: I am going to offer in evidence as the plaintiff's next exhibit the contract which was identified by the defendant at the previous hearing, as the contract which is herein now being sued on.

The Clerk: As Defendant's Exhibit B?

Mr. Schwartz: The next exhibit.

Mr. Finston: I am going to object to this document as being irrelevant, immaterial and incompetent. [42]

The Court: Overruled.

The Clerk: It is marked No. 3, your Honor, and received in evidence?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

The Clerk: And it was Defendant's Exhibit B in Case No. 14,787.

The Court: All right.

Mr. Finston: Now, I am sorry, I was examining this document at the time I think counsel attempted to offer another document. Is that correct?

Mr. Schwartz: No.

Mr. Finston: Did you attempt to offer the other contract in the previous case?

Mr. Schwartz: No, this is the contract here, Mr. Finston.

The Court: No, the contract that he is talking about. This is the contract that the notary did not identify. However, the words of the witness show the date and the contract. That is where the preliminary examination of the witness helps in identifying the document, where the document for some reason is not identified by the notary.

Mr. Schwartz: As a matter of fact, a copy of this document——

The Court: Let's go on, gentlemen. It is nearly noon, so let's go on and make some progress. [43]

Mr. Schwartz: At this time, if the Court please, I will read from the deposition of Robert Kagan, taken on February 5, 1954, in Chicago, Illinois, pursuant to Notice, which deposition was taken in the case of Kagan & Gaines Co., Inc., v. Alfio Batelli, in Case No. 14787-T.

Mr. Finston: Your Honor, may I merely have an objection to the offer of this document on all the grounds previously stated?

The Court: Overruled.

Mr. Schwartz: "Robert Kagan, a witness, called in plaintiff's behalf,"——

The Court: Wait a minute. We are skipping one thing here. The contract has not been given a number yet.

The Clerk: Yes, your Honor, No. 3.

The Court: Oh, I beg your pardon. I didn't hear you, Mr. Stacey. Go ahead.

Mr. Schwartz (Reading):

"ROBERT KAGAN

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:

"Q. Will you state your name?

"A. Robert Kagan.

"Q. Where do you live? [44]

"A. 3750 Lake Shore Drive.

"Q. Is that in Chicago, Illinois?

"A. Chicago, Illinois.

"Q. What is your business or occupation?

"A. I am the President of Kagan & Gaines Co., Inc.

"Q. Is that an Illinois Corporation?

"A. Yes.

"Q. Where is your place of business?

"A. 228 S. Wabash Avenue, Chicago.

"Q. How long have you been in business?

"A. Since 1926.

"Q. For how long?

"A. Twenty-eight years.

(Deposition of Robert Kagan.)

"Q. What is your business?

"A. Musical instruments, mainly stringed instruments, buying, selling, importing and repairing.

"Q. Now, approximately what is your gross business a year, what has it averaged?

"A. About $200,000.00.

"Q. Who do you cater to, who do you deal with?

"A. To professional musicians and schools, also Universities.

"Q. And dealers throughout the United States?

"A. Yes, sir.

"Q. What is your position with the firm? [45]

"A. I am the President of the Company.

"Q. In addition to that are you one of the main stockholders? A. Yes.

"Q. What percentage of the stock do you own?

"A. Ninety-nine per cent.

"Q. Now, what percentage of your business, approximately, comprises the repairs of musical instruments, stringed instruments?

"A. About twenty-five per cent.

"Q. So that normally during the year, your gross billings for repair of musical instruments would be approximately how much?

"A. About $50,000.00. However, this includes brass and wood instruments.

"Q. Approximately how much of this would be stringed instruments?

"A. About $25,000.00.

"Q. Now, approximately what markup is there.

(Deposition of Robert Kagan.)

what gross markup is there in regard to repairs of stringed instruments?

"A. About one-half profit.

"Q. What has your stringed instrument department been bringing you as far as profit is concerned?

"A. Between $12,500.00 and $13,000.00. [46]

"Q. How many employees have you averaged in your stringed instrument department, repair department?

"A. Between two and three, one bow repair man and two violin makers.

"Q. So then actually the ones who work on the instruments total two, is that correct?

"A. Yes, sir.

"Q. Two violin repair men? A. Yes.

"Q. When you say 'violins,' does that also include violas, cellos and basses? A. Yes.

"Q. Are you acquainted with the availabilty of violin and stringed instrument repair men in Chicago for the period of 1947 through and including 1950? A. Yes, sir.

"Q. What was the market at that time?

"A. Not only during this period, but at all times it is actually almost impossible to get even a fair violin maker available for employment.

"Q. That goes for violin repair men?

"A. Yes.

"Q. When you speak of a violin maker, you are also including violin repair men?

"A. Yes. [47]

(Deposition of Robert Kagan.)

"Q. Then would you say that they were very scarce during all that period of time?

"A. Extremely so. That is the only reason that the United States Government allowed us to import this labor from Europe.

"Q. Are you acquainted with one Alfio Batelli?

"A. Yes.

"Q. When did you meet him?

"A. I heard of him from inquiring of American soldiers who were our customers and who were stationed in Europe.

"Q. They had been in Italy, had these soldiers been in Italy? A. Yes.

"Q. They had told you about these men?

"A. I asked many of our customers when in Europe to look around for any violin maker or repair man, which is the same thing really, who would be willing to come to the United States and to work for our firm.

"Q. So you heard of this Alfio Batelli?

"A. Yes.

"Q. What did you do after you heard about him?

"A. I wrote him a letter and asked him whether he would be interested to come to the United States and work for our firm. [48]

"Q. Approximately when was this letter written; have you any idea?

"A. The latter part of 1946.

"Q. Did he answer you? A. Yes.

"Q. When did you receive the answer?

(Deposition of Robert Kagan.)

"A. I got his first letter immediately about a week or so after my first letter to him.

"Q. What did he say?

"A. That he was most interested to come to this country and actually pleaded with me to get him a permit to come to the United States.

"Q. What, if anything. did you do after hearing from him?

"A. I immediately contacted the Immigration Department in Chicago and engaged an attorney to expedite his arrival to the United States.

"Q. Did you hire an attorney at the time?"

Mr. Finston: Just a moment, Mr. Schwartz. Now, in addition to my general objections that the whole deposition is inadmissible as being inadmissible hearsay, as being irrelevant, incompetent and immaterial, and not being within any of the issues framed in these pleadings, I am going now to make a specific objection to this question, the question, "Did you hire an attorney at the time," because it is totally immaterial, [49] irrelevant and incompetent, and it has nothing to do with the prayer in the complaint, it has nothing to do with the statement of any cause of action, as to whether he hired an attorney for any purpose whatsoever, and whether he did or not would have no bearing at all upon any damages caused by the alleged breach of the contract.

The Court: The objection is overruled. This is an unusual situation, where a person imports somebody from another country under the laws which

(Deposition of Robert Kagan.)

permit certain artisans to be imported, and the nature of the contract, the fact that certain clauses were put in it which are not usual, becomes apparent if the facts are actually shown, that this man brought him here, that he was anxious to have him, and, later on, as already appears from the testimony in the case, even employed an attorney to make his temporary stay under a visitor's permit permanent. The court takes judicial notice of the fact that it is very rarely that a person is allowed to come in unless he comes in first on a temporary permit, unless he comes under the quota, so that all this bears upon the relationship between the parties, and the reason for the desire of both sides, evidently, so far as the court has been informed, to have a contract which was more lasting than the average contract. Overruled.

Mr. Schwartz (Continuing reading):

"A. Yes. [50]

"Q. Did you pay this attorney anything?"

Mr. Finston: I make the same objection to that question.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes.

"Q. How much did you pay him?

"A. $300.00."

Mr. Finston: The same objection.

The Court: Overruled.

Mr. Schwartz (Reading):

"Q. And what took place?

(Deposition of Robert Kagan.)

"A. After lengthy correspondence with Washington and procuring various documents required by the Immigration Department as to my ability to employ him, and also the approval of the United States Unemployment Division to the fact that violin makers were not available, I finally received a permit for his arrival to the United States.

"Q. When was that?

"A. In 1947, I think in June or July, something like that.

"Q. Following the permit, did Mr. Batelli come here? A. Yes.

"Q. And he arrived here approximately when?

"A. June or July in 1947. [51]

"Q. What did he do?

"A. I have arranged a hotel room for him. I paid for his hotel room not far from our office, so that he should not have to travel and I purchased for him a bench and all the necessary tools and equipment. I bought him some clothes.

"Q. Now, approximately what did you spend for his fare?"

Mr. Finston: Just a moment. Your Honor, that question has nothing to do with any claim for damages, has no bearing upon what damages may have approximately flowed from an alleged breach of this contract, and the question is totally immaterial, irrelevant and incompetent.

The Court: Read the question again.

Mr. Schwartz: "Q. Now, approximately what did you spend for his fare?"

(Deposition of Robert Kagan.)

I think it is illustrative of the entire picture.

The Court: All right. Overruled. I think I allowed the other one, that he employed the attorney and what he paid for fees, to show it was not just an ordinary contract of hire. Overruled.

Mr. Schwartz (Continuing reading):

"A. About $300.00.

"Q. Did you furnish that? A. Yes. [52]

"Q. Approximately what did the other expenses amount to?"

Mr. Finston: The same objection, your Honor, to that one. The same objection, to cover all the grounds I have covered in my previous objections.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. About another $100.00 out of my own pocket and also about $250.00 from Kagan & Gaines for buying the necessary tools and equipment.

"Q. Were you ever reimbursed for this money?"

Mr. Finston: Just a moment. The same objection.

The Court: Overruled.

Mr. Finston: Upon all of the grounds previously stated.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. No, sir.

"Q. So Mr. Batelli began to work for you then at what salary?

"A. I started him at $35.00 for the first week in order to find out his ability.

(Deposition of Robert Kagan.)

"Q. What did you discover?

"A. I discovered that his quality of work did not live up to American standards. However, I saw with some experience he could develop to be a pretty capable [53] repair man.

"Q. So, what if anything did you do?

"A. I have given him about a hundred violin bridges and began to show him how the bridges were to be cut to satisfy quality work demanded by American musicians. I have also given him some of our own inexpensive violins in order to show him the type of work that is required in our shop.

"Q. Did Mr. Batelli continue to work for you then? A. Yes, sir.

"Q. In what capacity?

"A. As a violin repair man.

"Q. How long did he continue to work for you?

"A. He worked for me until some time in 1950.

"Q. What was his salary at that time?

"A. His salary was progressing, it was increasing every few weeks.

"Q. For how long a period did he stay at $35.00 a week? A. About a week or two.

"Q. When what was his salary?

"A. I was increasing it $5.00 every so often.

"Q. Did he have a contract with you at that time? A. No, sir.

"Q. Incidentally, how long did he work under this [54] work permit?

"A. For a year's time.

"Q. What was his salary at the end of the year?

(Deposition of Robert Kagan.)

"A. By that time his salary was about $50.00 or $55.00, I don't remember exactly.

"Q. What took place at the end of the year?

"A. At the end of the year, the Immigration Department wanted to send him back to Italy."

Mr. Finston: Just a moment. I move to strike that out as being the opinion and conclusion of this witness.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"Q. This would have been then in 1948?

"A. Yes.

"Q. What, if anything, took place then?

"A. I went to the Immigration Department myself and after discussing with the Chief Immigration Officer in Chicago and calling and corresponding with the head of the Immigration Department in Washington, I got him an extension for six months.

"Q. That brought it into 1949?

"A. Yes, sir.

"Q. What took place then?

"A. At the end of six months again the Immigration Department wanted to send him back to Italy and again [55] through a lot of efforts I received a permit to extend it another six months and I have engaged then an attorney to see if we can prove to the Immigration Department the importance of having this man remain in this country permanently.

"Q. As a United States citizen?

(Deposition of Robert Kagan.)

"A. As a United States citizen.

"Q. Which attorney did you hire for that?"

Mr. Finston: Just a moment. I object to that as totally immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Finston: What is the difference whether he engaged an attorney, or who he engaged?

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. Mr. Joseph Golde.

"Q. Who was he?

"A. He was an attorney practicing in Chicago.

"Q. What arrangements did you make with Mr. Golde?

"A. Mr. Golde told me that it is a very difficult job,"——

Mr. Finston: Your Honor. I object to all of this as inadmissible hearsay. We are not interested in what Mr. Golde told anybody.

The Court: Overruled. [56]

Mr. Schwartz (Continuing reading):

"A. Mr. Golde told me that it is a very difficult job, that he may have to make trips to Washington to prove his case and he expected me to pay him the money he expended. He also told me that he does not guarantee that he will succeed, but he promised to do his very best and his fee and expenses may run as high as $1,500.00.

"Q. Did you enter into a contract with Mr. Golde?"

Mr. Finston: Just a moment. I object to that.

(Deposition of Robert Kagan.)

Of what consequence is it whether this plaintiff entered into a contract with Mr. Golde or not? I object that this question is totally immaterial, irrelevant and incompetent.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. Yes, sir.

"Q. I show you Plaintiff's Exhibit 1 for identification and ask you if this is the contract which you signed with Mr. Golde concerning this?

"A. Yes.

"Q. This provided for payment of $1,200.00?

"A. Yes.

"Q. Did you pay Mr. Golde the $1,200.00?

"A. Yes.

"Q. I show you Plaintiff's Exhibit 2 for identification and Plaintiff's Exhibit 3 for identification and [57] ask you what these purport to be?

"A this is the first $200.00 check I gave him, Mr. Golde.

"Q. That is Plaintiff's Exhibit 2."

Mr. Finston: Just a moment, Mr. Schwartz. I am objecting to all of those questions and answers pertaining to whether or not he paid any money to Mr. Golde for the simple reason that they have no bearing at all upon any of the issues framed in this case. This is not a suit for their recovery.

The Court: Overruled. I have already ruled these bear upon the relationship between the parties, to show how the contract of employment was entered

(Deposition of Robert Kagan.)

into, even though no claim for reimbursement of those damages is asked for these expenditures. Overruled.

Mr. Finston: I will state in that connection that there was nothing in the contract in this suit which has any bearing whatever, directly or indirectly, upon any possible contract that this plaintiff may have entered into with any third parties.

The Court: That is right. Overruled. Also, on the assumption that the defendant has pleaded his counter-claim in good faith, I will allow it in anticipation, to show these relationships as going to prove good faith. These expenditures of money would show why, after all of this difficulty the plaintiff felt so disappointed that he instituted the [58] action. So it bears upon that action also, and while it is anticipatory, no error can be committed. I assume that counsel, having pleaded that in rebuttal, and having asked for a continuance when the case was set on the ground that they had to have a witness present here at the time, and having gotten it, he will attempt to prove their contract. He does not have to, but I have a right to assume that all of his actions, in filing it and asking me to continue the case so that he could prove it were made in good faith, and in anticipation I have allowed these questions to be asked, as going to the good faith of the plaintiff.

Mr. Finston: Then I will answer that, if I may, at this point, your Honor. At the time the counter-claim was filed for malicious prosecution, I had a

(Deposition of Robert Kagan.)

discussion with my client, Mr. Batelli, and he indicated to me that there were many persons in Chicago who also saw Mr. Kagan, the plaintiff, tear up the first contract. On that basis I discussed with the client the question of malicious prosecution on the contract by the plaintiff, which he knew he had deliberately torn up.

I might also say this, that at the time we made an application for a continuance, Mr. Batelli was contemplating bringing in certain witness or witnesses from Chicago. Since then such witnesses have not been brought in because Mr. Batelli earns $65.00 a week. He tried very hard to contact [59] certain witnesses, or attempted to contact certain witnesses, and I don't want to disappoint the court at this point,——

The Court: I am not disappointed.

Mr. Finston: ——but I am simply answering the arguments for the record. There will be no attempted proof of the cross-complaint for failure of evidence, because Mr. Batelli——

The Court: The ruling still stands. If at the time the plaintiff rests, you announce that you are not offering evidence on the cross-complaint, you may renew the motion to strike this testimony from the record.

Mr. Finston: May I make one further observation? At the time the motion was made for the continuance of this action, in order that we may have an opportunity perhaps to bring in an additional witness, at the very same time another

(Deposition of Robert Kagan.)

motion was made to require the plaintiff in this case to have his deposition taken on written interrogatories rather than on oral interrogatories, and an explanation was then made to the court that this plaintiff was a poor working man, earning $60.00 or $65.00 a week, and could not afford any representation in Chicago on a deposition taken on oral interrogatories, and the court denied that motion.

The Court: That is right. I will still allow these questions to be asked, subject to a motion to strike later on if no evidence as to the counter-claim is offered. Go ahead. [60]

Mr. Schwartz: "Q. That is Plaintiff's Exhibit 2."

Mr. Finston: At what page, please? Page 11?

Mr. Schwartz: Page 11.

Mr. Finston: At the middle of the page?

Mr. Schwartz: Yes. (Reading):

"Q. That is Plaintiff's Exhibit 2. And what is Plaintiff's Exhibit 3?

"A. That is a check for $1,000.00 which I gave him.

"Q. Or a total of $1,200.00, which was paid to Mr. Golde? A. Yes.

"Q. According to the contract which you signed with Mr. Golde, what was he to do for this $1,200.00?

"A. As I stated before, he was supposed to perform all the necessary work and he was to procure citizenship for Mr. Batelli and he was also to

(Deposition of Robert Kagan.)

prepare a contract of employment for Mr. Batelli to be employed by Kagan & Gaines, Inc.

"Q. Now, prior to signing this contract, did you have a conversation with Mr. Batelli?

"A. Yes, sir."

Mr. Finston: I object to all conversations had with Mr. Batelli prior to the signing of any contract.

The Court: The objection will be overruled. As the answer to the question shows, these negotiations were all [61] bunched together, and the efforts to secure citizenship were a part of his contract to follow for employment for a period of years, so that they are all interrelated and should not be split up. Go ahead.

Mr. Schwartz: "Yes, sir."

That is, the question was:

"Q. Now, prior to signing this contract, did you have a conversation with Mr. Batelli?

"A. Yes, sir.

"Q. Approximately when did it take place?

"A. The early part of July, 1949.

"Q. Where did it take place?

"A. In my office.

"Q. Who was present at that time?

"A. Mr. Batelli and myself.

"Q. What, if anything, did he say and what did you say?

"A. I told Mr. Batelli that I am spending an awful lot of efforts and money to try to make him an American citizen and I would not want to do all this if he does not intend to stay and I asked

(Deposition of Robert Kagan.)

him whether he is prepared to sign a contract with me for a period of a minimum of five years. On that he answered not only for five years, but he will work for me for the rest of his life because he is so grateful for what I have done for him. [62]

"Q. What steps then did you proceed to take in connection with the citizenship?"

Mr. Finston: I object to all of that as being totally immaterial. irrelevant and incompetent, and not within any of the issues framed by the complaint.

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"A. I turned over all the correspondence with Washington and Unemployment Compensation Bureau to Mr. Golde and Mr. Golde is the one who procured a special Bill before the Congress and he became an American citizen.

"Q. Did you also have to procure certain affidavits from various people?

"A. Yes. At Mr. Golde's request, I had to go to some of our competitors and confirm my statement that violin makers are extremely scarce and badly needed in the United States and Mr. Batelli is worthy to become an American citizen."

Mr. Finston: I move to strike that entire answer as being inadmissible hearsay.

The Court: Read the question again.

Mr. Schwartz (Reading):

(Deposition of Robert Kagan.)

"Q. Did you also have to procure certain affidavits from various people? [63]

"A. Yes. At Mr. Golde's request, I had to go to some of our competitors and confirm my statement that violin makers are extremely scarce and badly needed in the United States and Mr. Batelli is worthy to become an American citizen."

The Court: Overruled.

Mr. Schwartz (Continuing reading):

"Q. As a result of Mr. Golde's efforts, what, if anything, took place?

"A. The Bill was presented before Congress.

"Q. Was it enacted?

"A. It was enacted and signed by the President and he became an American citizen.

"Q. At that time did you prepare a contract with Mr. Batelli?

"A. Mr. Golde prepared a contract as per my agreement with Mr. Batelli. He took this contract home with him to study it, as he expressed himself, and came back the next morning and told me everything is all right and he signed it and gave it to me.

"Q. Now, was this signed in your presence?

"A. Yes, sir.

"Q. And this contract was the same contract that is listed in this cause of action as Exhibit 'A'?

"A. Yes, sir." [64]

For the record, I think it should be shown he was referring to the first contract in this testimony, and not the second.

The Court: All right.

(Deposition of Robert Kagan.)

Mr. Schwartz (Continuing reading):

"Q. And this contract has not been changed in any way? A. No, sir.

"Q. It is in the same condition now as when you signed it? A. Yes, sir.

"Q. Now, what was the salary of Mr. Batelli at that time? A. $75.00 a week.

"Q. Was it signed on the day that it bears, namely, June 1, 1950? A. Yes, sir.

"Q. Now, did Mr. Batelli ever repay you for any of this money that you advanced?

"A. No, sir.

"Q. Did Mr. Batelli work for you the five years as listed in this contract? A. No, sir.

"Q. When did he cease his employment with your Comany?

"A. Approximately in June, 1951. [65]

"Q. Did he give you any notice?

"A. No, sir.

"Q. Will you please tell the court what, if anything, took place at that time?

"A. Mr. Bartelli told me that two weeks vacation is coming to him and he wants to get on his own two weeks without pay and he likes to go to Italy and liquidate his affairs there and bring his family to this country.

"Q. Did he request any vacation?

"A. He said two weeks was due him and he requested the money for those two weeks and he requested permission to stay an extra two weeks.

"Q. What, if anything, did you say?

(Deposition of Robert Kagan.)

"A. I told him it is perfectly all right for him to go and bring his family and I told him that, upon his arrival back, I will be glad to try to procure for him a larger apartment and I will do everything possible to make him and his family comfortable, but I impressed upon him the fact that he should not stay longer than four weeks, because of the accumulation of work which we have on hand and which will accumulate during his absence."

The Court: Mr. Schwartz, the present deposition has already gone into that.

Mr. Schwartz: I agree.

The Court: It seems to me that that portion could very [66] well be omitted, and get down to some of those figures in regard to losses.

Mr. Schwartz: I agree, your Honor.

The Court: The other questions had been gone into in the second deposition, so this is repetitious.

Mr. Schwartz: I agree, sir.

The Court: Because he testified in the deposition in this case that he even gave him a party, and that he thought his family was not here. So there is no use to repeat that. Perhaps if we took a recess—it is after 12:00 o'clock now, and, as you know, I have other duties other than trial work——

Mr. Schwartz: Yes, sir.

The Court: ——you might go over that and eliminate some of the things that are in the deposition you have already read, and just merely read what is left that is not in the other deposition.

(Deposition of Robert Kagan.)

Mr. Schwartz: Very well. I will do that, your Honor.

Mr. Finston: I wonder how we can do that. Mr. Schwartz has ceased talking to me since the conclusion of the last case.

The Court: How is that?

Mr. Finston: I wonder how we can do that. Mr. Schwartz has ceased talking to me since the conclusion of the last case. [67]

The Court: I am not asking him to consult with you. I am merely saying for him to go over the record and see if he can eliminate something, and then if you want it in, you can have it in.

Mr. Finston: Thank you, sir.

The Court: One party has a right to read any portion of a deposition, and if he leaves something out, the other side may read that. I am not suggesting anything else. I realize that in the mood in which you find yourself this morning that any approach by the other side would not be fruitful of results .

Mr. Finston: I am not in that mood at all, sir.

The Court: Just a moment. I am taking you at what you said. I am merely saying that I am not suggesting that you two get together on it. I am merely suggesting that he go over it and eliminate things which, in my opinion, are covered by the other deposition, and to merely confine himself to offering what is not in the other deposition, subject to your right to have it in if you want it, as the rules provide.

(Deposition of Robert Kagan.)

Mr. Finston: Fine.

The Court: All right. 2:00 o'clock. By the way, do you want Mr. Batelli here?

Mr. Schwartz: I think he ought to be here.

The Court: All right. I will order the defendant to produce Mr. Batelli at 2:00 o'clock. [68]

Mr. Finston: May I ask, your Honor, with all due respect, on what authority such an order is made?

I want to ask this question: Am I under obligation to help the opposition prove his case? I am trying to represent my client as well as possible.

The Court: That is right.

Mr. Finston: This is my client.

The Court: If you don't want to——

Mr. Finston: I couldn't understand the basis for the court's order, to have the client brought in. I am going to bring the client in, but I could not understand the basis for the court's order.

The Court: You don't need to understand it. A lawsuit is not a game, and when a man comes into court and asks affirmative relief in a case, and the other side wants to examine him under 43(b), even if they have not issued a subpoena, I have the right to issue a forthwith subpoena, and rather than issue it forthwith and send the marshal out for him, I am giving you an opportunity to produce him. If you don't want to do so——

Mr. Finston: I was going to produce him, but I didn't think it was in the interests of my client

(Deposition of Robert Kagan.)

that I produce him to help the opposition prove its case.

The Court: I am not ordering you to produce him. I am merely saying counsel has requested his presence. I am giving [69] you an opportunity to bring him here. If at 2:00 o'clock he isn't here, I will issue a forthwith subpoena, and send the marshal out to produce him.

Mr. Finston: He will be in, sir.

The Court: All right.

(Whereupon at 12:10 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day). [70]

Wednesday, March 9, 1955, 2:00 P.M.

The Court: Cause on trial.

Mr. Schwartz: Reading from Page 16 of the deposition of Mr. Robert Kagan of February 5, 1954:

"Q. What wages was he receiving at the time that he left you?

"A. $75.00 a week."

Then I am skipping the next two questions and answers, and come to this question:

"Q. During the time that you—immediately preceding the time that Mr. Batelli left, did you engage in any advertising concerning Mr. Batelli's work?"

Mr. Finston: I am going to object to that question on all the grounds heretofore given on similar objections to similar questions.

(Deposition of Robert Kagan.)

The Court: Overruled.

Mr. Schwartz (Reading):

"A. Yes, sir. I spent considerable money advertising in various programs in schools, universities and the Chicago Symphony.

"Q. Approximately how much did you spend in the year preceding his leaving in advertising?"

Mr. Finston: The same objection, your Honor.

The Court: Overruled. [71]

Mr. Schwartz (Reading):

"A. About $300.00

"Q. And the year prior to that?

"A. About $150.00.

"Q. Can you give us the names of some of the publications in which you took ads?

"A. Chicago Symphony Orchestra programs, Catholic Schools program, Chicago Public Schools Programs.

"Q. Now, I show you page 3 of the Sigmund Romberg program on April 29, 1951, and ask you if you placed that ad concerning Mr. Batelli?"

Mr. Finston: Just a moment. I object specifically to this question as it does not even cover the period in suit. The complaint is based upon a contract allegedly entered into in June of 1950, or 1951, your Honor.

Mr. Schwartz: 1950.

The Court: What is the date of the program?

Mr. Schwartz: April 29, 1951. He left in June, 1951.

Mr. Finston: I am sorry, your Honor. I mis-

(Deposition of Robert Kagan.)

stated the condition. I will withdraw that specific objection, sir.

Mr. Schwartz (Continuing reading):

"A. Yes.

"Q. Is that the size of the ad which you normally would take in the various publications?

"A. Yes. [72]

"Q. I show you page 5 of the Arturo Toscanini program of May 17, 1950, and ask you if that is another example of the ad of Kagan & Gaines and Mr. Batelli?"

Mr. Finston: Just a moment. I am going to object to that question as it covers a period of time which antedates the date of the contract in suit.

The Court: Overruled. It tends to show that the advertising campaign was continuous from the time of the original employment. Go ahead.

Mr. Schwartz (Reading):

"A. Yes, sir.

"Q. What other advertising did you arrange for? A. Newspapers.

"Q. What did this advertising consist of?

"A. Articles and photographs placed in all the leading Chicago papers during the month of May, 1950.

"Q. Did this cost you any money?

"A. Approximately $100.00 for entertainment and expenses.

"Q. Was this money reimbursed you by Mr. Batelli? A. No, sir."

Now, skipping to Page 18, this question:

(Deposition of Robert Kagan.)

"Q. Did you keep a record approximately of how many instruments you had in your plant for repair at the time you found out that Mr. Batelli was not returning?" [73]

Mr. Finston: Just a moment, please, Mr. Schwartz. I don't see that question. Is that on Page 18, sir?

Mr. Schwartz: Page 18, the first question after the answer on top. Do you find it?

Mr. Finston: Yes.

Mr. Schwartz (Reading):

"A. Yes.

"Q. How many were there?

"A. There were thirteen violins with various amounts of work to be done and the total amount of the labor on these instruments was $700.00.

There were two violas with major repairs. The total work on these amounted to $200.00.

There were six cellos, the total amount of work on these was $500.00.

There were two basses and the total work on that amounted to $100.00.

"Q. So the gross amount of work was approximately how much? A. $1,500.00.

"Q. Now, approximately what would the profit be on these items?

"A. About from one-third to one-half approximately, between $500.00 and $700.00.

"Q. What did you do with this repair [74] work?

"A. Ninety per cent of this work I had to return

(Deposition of Robert Kagan.)

to the customers because of our inability to repair it and ten per cent of it was sublet to other violin makers in Chicago.

"Q. Could you have sublet the others?

"A. No, sir, they were all extremely busy. They did me a favor and did the inexpensive instruments that people needed very badly as a favor to me and they repaired it at the price we agreed to repair these instruments, so we made no profit at all.

"Q. Did you lose any customers as a result of this? A. Definitely so.

"Q. Do you know approximately who the customers were? A. Yes.

"Q. What customers did you lose?

"A. We lost two violinists, who were very angry and still are for not performing their work and we lost about six schools for the same reason.

"Q. Now, approximately how much gross business did you receive previously from those accounts and do you know the names of the musicians?

"A. Yes.

"Q. What are their names?

"A. One is Wilkomirski and one is Kowalkowski. [75]

"Q. Approximately how much business per year did you usually receive from these accounts?

"A. It is pretty hard to say, but approximately from all of them about $2,000.00 a year.

"Q. According to this contract, who was to receive Mr. Batelli's exclusive services?"

(Deposition of Robert Kagan.)

Mr. Finston: Just a moment. Objection, because the question is directed to a contract not in suit. The question is directed to a previous lawsuit affecting this particular contract, but the previous lawsuit has been completely adjudicated and is a thing of the past. The question is immaterial, irrelevant and incompetent.

Mr. Schwartz: Your Honor, the question does not go to any previous lawsuit. The question goes to the contract.

Mr. Finston: The question goes according to that contract.

Mr. Schwartz: Yes. Now, the contract this is referring to has exactly and identically the same provision as does the one in suit.

Mr. Finston: I am not trying to interpret the contracts. I am merely stating that the question is directed to a contract in connection with a suit which has been previously brought and completely adjudicated.

The Court: Let us not get away from the scope of this inquiry. The fact remains the previous lawsuit was not adjudicated, or it was adjudicated only on a very narrow point, and [76] that is, that the contract sued on had been abandoned. I did not find anything on the issues. In fact, I didn't approve the findings of counsel, nor the counter-findings you had proposed, and I wrote my own findings, and I said specifically that I am making no findings as to damage. In paragraph 12 I say:

"In view of the conclusion reached that the agree-

(Deposition of Robert Kagan.)

ment sued on was abandoned by the parties and was not in force at the time the defendant terminated his employment, without legal cause or excuse, and/or at the time when the action was instituted, the court makes no findings as to any of the other issues raised by the complaint and answer, including, more specifically, the issue of damages claimed by the plaintiff."

So I made no finding as to it, and specifically said so. Therefore, the question of damages as of the time that the new contract was entered into, and at the time he left the employment, is open. To show that specifically, here are the proposed findings by Mr. Schwartz, and he put in a paragraph where he wanted this finding:

"By reason of defendant's failure to notify Plaintiff of Defendant's termination of his employment, Plaintiff was damaged in its business."

I eliminated that, and I said that I am not making any findings as to the damages, so that question is entirely open. [77]

So the other case merely adjudicates that one thing. That is why I say, in retrospect I think I made a mistake. I think I should have allowed the pleadings to be modified as to the new contract, and if you had pleaded then that you were taken by surprise, I should have continued the case, because the new rules say that amendments should be allowed at all times as of course, and we could have continued it, and the case would not have had to be gone over. But I thought because

(Deposition of Robert Kagan.)

of the clear issue upon that one proposition, I should not allow it. But to go back to it, I say that is all I decided. I did not decide they were not damaged. I merely said that I am not making any finding as to damages. So you won the case on merely a technical proposition, that the contract they sued on was terminated.

Now they have brought a new suit on the contract that was substituted, and then all the questions are before me: Where this new contract was broken, whether it was in existence at the time of the termination agreement, and whether there was damage. And that evidence was given. It matters not whether it relates to one contract or the other. We are concerned with what damage they suffered at the time the man left the employ. He admitted he left the employ. I don't think it is denied in the pleadings here that he left the employ. So the question of damages from the time of the severance, we will put it that way, from the time of the [78] separation, so as not to say that he left because of or implying any fault on the part of anybody, is in issue.

The objection is overruled. Go ahead.

Mr. Schwartz (Reading):

"Q. According to this contract, who was to receive Mr. Batelli's exclusive service?

"A. Kagan & Gaines, Inc.

"Q. Do you know of your own knowledge whether Mr. Batelli complied with this provision of the contract? A. I do know.

"Q. Did he? A. He did not comply.

(Deposition of Robert Kagan.)

"Q. In what way? In what way did he breach this contract?

"A. I found out that he had used our materials,"——

Mr. Finston: Just a moment. I am going to object to that whole answer as apparently not even being testified to from personal knowledge. It sounds like a hearsay answer, "I found out that he had used our materials," et cetera, et cetera. There isn't the slightest indication that there is any testimony in here from the witness' personal knowledge or personal observation.

Mr. Schwartz: It is a matter of cross-examination, I submit.

Mr. Finston: That would be very fine if we had an [79] opportunity to cross-examine the witness.

Mr. Schwartz: You had an opportunity. You did not avail yourself of it.

The Court: Just a minute. Just a minute.

Mr. Finston: We didn't think we needed to.

The Court: The objection is overruled.

Mr. Schwartz (Continuing reading):

"A. I found out that he had used our materials, such as violin tops, backs, ribs and necks and on our time, while he was getting paid for his services, on the sly he was making some violins.

"Q. Do you know how many he made?

"A. To my definite knowledge he made five violins."

Going now to the next page:

"Q. Do you know some of the people who he

(Deposition of Robert Kagan.)

sold these violins to? A. Yes.

"Q. What are their names?

"A. One is Mort Schaffner."

Then the next question:

"Q. Who else?

"A. Through Mr. Schaffner another violin was sold to Mr. Schaffner's friend. I do not remember his name. He is a cripple, a former musician."

Then skipping the next question: [80]

"Q. Were there any other people that you know of?

"A. He sold some violins to his Italian friends, whose names I do not know.

"Q. But in all there were five violins?

"A. Yes.

"Q. Or a total sales price of approximately $1,500.00?"

Mr. Finston: Just a moment. I am going to object to that question. I want to show your Honor what questions were omitted before counsel reached this last question.

The Court: He omitted them at my suggestion. If you want them in, we will put them in.

Mr. Finston: No. May I indicate why I am going to object to this question? These were the questions that were omitted, and properly omitted, and I am reading from Page 20, the last question, which reads as follows:

"Q. Do you know what the price of these violins was?"

And the answer is: "From what I gather from

(Deposition of Robert Kagan.)

people who bought these violins from him, he sold them for $300.00 each," which is an obvious heresay statement.

The Court: No, the hearsay rule does not apply to prices paid, and especially the price of personal property, and almost anything. Price may be proved by knowledge of the person, by what somebody else told him as to the price actually paid, and the Circuit Court of Appeals has so held [81] repeatedly in this circuit.

The easiest thing to prove is price. As a matter of fact, I wrote an opinion, and I can't now think of the case in which I wrote it, for the Court of Appeals, in which I gathered all the cases and showed that the greatest liberality obtains in such proof. No, I think Judge Healy wrote it, because it was a per curiam opinion, in which I participated. I will have it before the day is over, and I will give you the case. It was a bankruptcy case which arose from Arizona. And you can even prove it by book value, the way it was entered on the books. Go ahead.

Mr. Schwartz (Continuing reading):

"Q. Did Mr. Batelli ever reimburse you for either the time or materials of yours that were used by him? A. No.

"Q. Did he ever tell you he was taking this merchandise from you? A. No, sir."

Now, I am going to skip to this question, which is on Page 23:

"Q. Now, actually as far as your damages, Mr.

(Deposition of Robert Kagan.)

Kagan, you paid Mr. Batelli two weeks' salary before he left? A. Yes, sir.

"Q. He never returned and never worked those two weeks, is that correct? [82] A. Yes.

"Q. How much was that salary?

"A. $150.00.

"Q. About how much repairs did you lose during the period he was gone?

"A. About $750.00.

"Q. That would be net profit? A. Yes.

"Q. At the time Mr. Batelli left how much money did he owe you in addition to the two weeks' salary?

"A. He owed me $185.00 on account of a $200.00 loan I gave him."

Mr. Finston: I object to that.

The Court: You are not seeking to recover that?

Mr. Schwartz: No.

The Court: That may be stricken.

Mr. Schwartz: All right.

The Court: You are seeking to recover merely general damages that have been lost in the second cause of action, and then the third cause of action is for materials?

Mr. Schwartz: That is right.

The Court: And the fourth cause of action is a general one, that he sold violins and failed to account.

However, when it comes to the damages, you have bunched together all the causes of action,

(Deposition of Robert Kagan.)

except the first one, into [83] that $1,500.00, under the different theories.

Mr. Schwartz: Yes, sir.

The Court: And your first count on general damages is contained only in Count I.

Mr. Schwartz (Reading):

"Q. Now, approximately what expenses incurred for Mr. Batelli have you not been reimbursed for?"

Mr. Finston: I object to that on all of the grounds previously stated.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. $1,200.00 advanced as attorney's fees;"—and that may go out, as far as I am concerned.

The Court: All right.

Mr. Schwartz (Continuing reading):

"——$200.00 in materials which he used to make violins for other people; $750.00, approximate profit for the work that we contracted for and which we had to return, and also we refunded the money as a deposit on five violins. There were five violins to be made by Batelli for five customers and on which we had received deposits and which we had to return on which we would have made approximately $700.00.

"Q. Do you have the names of the customers?

"A. Yes. [84]

"Q. What were their names?

"A. Mike Wilkomirsky, Joseph Chapek, R. Goldberg, Milton Predes and Franz Polosny.

(Deposition of Robert Kagan.)

"Q. What was the approximate sales price for these violins? A. $300.00 each.

"Q. How many violins were there?

"A. Five.

"Q. Did the volume of repairs that Kagan & Gaines made on stringed instruments continue to be the same following Mr. Batelli's departure?"

Mr. Finston: Just a moment. I object to that question as calling for the witness' conclusion. The volume may have been affected by a thousand different causes other than Mr. Batelli's departure.

The Court: Overruled.

Mr. Schwartz (Reading):

"A. No, sir. It dropped to about half.

"Q. So there was a loss of how much volume in business? A. About $10,000.00.

"Q. And about how much of that was net profit? A. About $3,000.00.

"Q. How long did the volume continue to be dropped?

"A. For about a year and a half to two [85] years."

Now, skipping over to Page 26:

"Q. Did Mr. Batelli ever sell new violins to other people on his own while in your employ?

"A. Yes, he approached customers of mine while they were in the Kagan & Gaines premises on routine business and in a sly way sold five violins at $300.00 each.

"He used my parts and the time for which I paid him and never paid me for anything.

(Deposition of Robert Kagan.)

"The people's names are Mort Schaffner, Philip Sharf and Ted Flowers and two other people whose names I don't remember at this time."

The Court: What was the total of those?

Mr. Schwartz: I beg your pardon?

The Court: What was the total of those items, or are those the same that are included in the prior figure?

Mr. Schwartz: No, these are five other violins at $300.00 each.

The Court: You mean he sold violins at that price?

Mr. Schwartz: Mr. Batelli did, yes, sir.

The Court: Of course, that does not show that it was all profit.

Mr. Schwartz: No, the profit factor he estimated to be one-third to one-half.

Mr. Finston: That is not so, your Honor. That profit [86] factor was based on, I think, not sales, but just on repair of instruments. You are talking now about sales of instruments.

The Court: These are over and above the sums which you gave me before, running to about $2,100.00 of losses on repair jobs. These are new ones. This is a claim of sale, and, of course, the sale price represents material, and assuming that the labor could not be charged for, he would still be entitled to reimbursement for the violins on which he worked.

Go ahead. I am just trying to see what actual proof of damage is going into the record, that is all. Does that end it?

Mr. Schwartz: That ends the deposition of Mr. Kagan. I want to introduce in evidence the program showing the kind of advertising that the witness referred to.

The Court: All right.

Mr. Finston: Of course, I object to that. At the most, it is immaterial.

The Court: Overruled.

Mr. Schwartz: Do you want to see it?

Mr. Finston: No.

The Court: Overruled.

The Clerk: That will be Plaintiff's Exhibit No. 4. Received in evidence, your Honor?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 4, and was received in evidence.) [87]

Mr. Schwartz: Then at this time I want to introduce from the files of Case No. 14787-T, which has heretofore been offered in evidence, the depositions on file therein of Philip Scharf and Anthony Kovalkowski.

Mr. Finston: And, your Honor, of course I object to them as being inadmissible hearsay. They are not depositions herein.

The Court: What is that?

Mr. Schwartz: These are depositions which are in the file which is in evidence, and these depositions were filed.

Mr. Finston: We never had the opportunity to cross-examine.

Mr. Schwartz: These were taken on notice.

The Court: Just a moment. Let's have one at a time, gentlemen. I am going to rule that all the depositions in the other case are admissible, because the other case was not decided on the merits, but was really a dismissal of the action on the ground that the evidence showed the contract had been abandoned, and for the other reasons I have already indicated I am going to allow all the depositions in the other case to be used in this case.

The Clerk: Should I mark them as an exhibit, your Honor?

The Court: No. I am merely ruling that they are admissible, but you will have to read the questions. You can give them a number for identification, and you will have to [88] read the questions, so that counsel can object to the individual questions as you read them.

The Clerk: That will be Exhibit No. 5, for identification?

The Court: I beg pardon?

The Clerk: That will be Exhibit No. 5, for identification?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 5, for identification.)

Mr. Schwartz (Reading):

"The depositions of Philip Scharf and Anthony Kovalkowski, witnesses, taken on behalf of the plaintiff in the above-entitled cause on the 25th day of March, A.D. 1954, at the hour of ten o'clock

a.m. at the office of Manuel J. Robbins, 39 South LaSalle Street, Chicago, Illinois, before Rose Finsky, a Notary Public in and for the County of Cook and State of Illinois, pursuant to notice.

"Present: Manuel J. Robbins, Esq.
"Appearing for Plaintiff

"PHILIP SCHARF

"a witness, called in behalf of plaintiff, being first [89] duly sworn, was examined and testified as follows:"——

Mr. Finston: Now, just a moment. May I interrupt? If they have been admitted in evidence, your Honor, I think we would save everybody's time if they are not read, because I objected to their admission in evidence——

The Court: I insist they be read, because I am not going to use my eyes and read them off the record.

Mr. Finston: All right. I am sorry. But my objection is clear, that I have objected to the introduction of these documents.

The Court: Then if you do not want to object to individual questions, it is up to you. But you started being technical, and I am being technical, too.

Mr. Finston: Then I would like to say this, that I have objection to every question on the ground that it is incompetent and immaterial and irrelevant.

The Court: All right. Then object at the

(Testimony of Philip Scharf.)

proper time. I am not going to accept a general omnibus objection. I will not buy a pig in a poke, if you know that expression, if you have lived on a farm.

Let's read it all individually, and you object to each question.

Mr. Schwartz (Reading):

"Direct Examination

"By Mr. Robbins: [90]

"Q. Will you state your name, please?

"A. Philip Scharf.

"Q. Your address?

"A. 6629 North Glenwood Avenue.

"Q. Is that in Chicago, Illinois? A. Yes.

"Q. What is your business or occupation?

"A. I am a musician with the Chicago Symphony Orchestra.

"Q. How long have you been so engaged?

"A. Ten years.

"Q. Are you acquainted with the firm of Kagan & Gaines? A. Yes.

"Q. In what capacity have you been acquainted with them?

"A. I bought strings there and they do repair work—have had repair work done for my violin.

"Q. How long have you known them?

"A. Eight years.

"Q. During these eight years have you purchased strings and had your repairs done at this Company? A. Yes.

(Testimony of Philip Scharf.)

"Q. Is this the Company you deal with?

"A. Yes. [91]

"Q. Are you acquainted with one Alfio Batelli?

"A. Yes.

"Q. Where did you meet him?

"A. At Kagan & Gaines.

"Q. When did you meet him?

"A. About February, 1950.

"Q. How did you meet him?

"A. I came to Kagan & Gaines and I saw him working at one of the benches. Most of the musicians seemed to know him. He was working there. He came over from Italy. Mr. Kagan brought him over. He told me he was trying to get his family here. He also told me he would like to talk to me about a violin and he told me that he would like to have me visit him at his home.

"Q. Were you introduced to him?

"A. Mr. Kagan introduced me.

"Q. What was he doing?

"A. This was his violin repairman.

"Q. Did he tell you where he lived?

"A. That is what I can't remember, but I think it was around Western and Madison, a room on the third floor. He was living with some people.

"Q. Did you go to his house? A. Yes.

"Q. When was that? [92]

"A. That was about six days after my conversation with him.

"Q. Did you see Mr. Batelli at his home?

"A. Yes, I did.

(Testimony of Philip Scharf.)

"Q. Did you have a conversation with him there? A. Yes.

"Q. Who was present?

"A. Just Mr. Batelli and myself. He told me that he would like to make a violin for me. He had two or three violins hanging there that he had made. He said, 'Why should I buy a violin at Kagans when I could get them cheaper if he would sell them to me right there at his home.' He told me he would gladly make a violin for me. Of course, this would have to be without Mr. Kagan's knowledge because he is giving it cheaper. He made me promise, of course, not to tell Mr. Kagan about this offer.

"Q. Did you give him an order to make a violin for you? A. No, I did not.

"Q. What, if anything, did you tell him at that time?

"A. I told him that I had done business with Kagan & Gaines for many years and that I could not do anything behind his back.

"Q. What did he say, if anything? [93]

"A. He didn't say anything after that. He made me promise that I would not tell Mr. Kagan about this whole conversation.

"Q. Did you know of any other musicians that Mr. Batelli approached on the same proposition?

"A. I had two or three come to me, but I can't remember who they were. Two or three other musicians came to me and told me that Mr. Batelli had made them the same offer.

(Testimony of Philip Scharf.)

"Q. You have no interest in the Kagan & Gaines Company? A. No.

"Q. You are testifying voluntarily and of your own free will? A. Yes."

And that was signed, "Philip Scharf, Witness."

"Anthony Kovalkowski,"——

Mr. Finston: Just a moment. Now, I am making my general objection to the whole deposition and every question contained therein on the ground that the deposition, or the alleged deposition is inadmissible hearsay, that it is incompetent, irrelevant and immaterial, and has no bearing upon any of the issues raised by the pleadings in this case. The objection applies to every one of the questions, as well as to the entire deposition. [94]

The Court: The obection is overruled.

Mr. Schwartz (Reading):

"ANTHONY KOVALKOWSKI

"a witness, called in plaintiff's behalf, being first duly sworn, was examined and testified as follows:

"Direct Examination

"By Mr. Robbins:

"Q. What is your name?

"A. Anthony Kovalkowski, also known as Tony Kovalkowski.

"Q. What is your address?

"A. 5347 West Leland Avenue.

"Q. Is that in Chicago?

(Deposition of Anthony Kovalkowski.)

"A. Yes, Chicago, 30, Illinois.

"Q. What is your business or occupation?

"A. I am a musician.

"Q. With whom are you associated?

"A. I am self-employed.

"Q. Do you have your own orchestra?

"A. Yes.

"Q. Do you know the firm of Kagan & Gaines?

"A. Yes.

"Q. How long have you been acquainted with them? A. At least ten years.

"Q. In what way have you been associated with Kagan [95] & Gaines?

"A. Well, in the purchase and repair of my violins for string. I bought a bow there.

"Q. Have you ever met Alfio Batelli?

"A. Yes, I did.

"Q. When and where did you meet him?

"A. At the firm of Kagan & Gaines late in 1949.

"Q. How did you meet him?

"A. I was introduced to him by Mr. Kagan.

"Q. Where was this?

"A. In the back of the shop.

"Q. Did Mr. Kagan tell you who he was or what he was?

"A. He was brought over by Mr. Kagan as his repairman here in Chicago.

"Q. Did you ever have any conversation with Mr. Batelli? A. Oh, yes.

"Q. Did you have occasion to talk to Mr. Batelli in about February, 1950? A. Yes.

(Deposition of Anthony Kovalkowski.)

"Q. Will you tell us when and where that conversation took place?

"A. That took place in the repair room in the Kagan & Gaines shop. He offered to make a copy of my violin. [96] I have a very fine violin and he offered to make me a copy of it.

"Q. Was this offer made on behalf of Kagan & Gaines? A. No.

"Q. What, if anything, did he say and what did you say?

"A. He said that by making it privately he could save me some money if I would not tell Mr. Kagan.

"Q. Was anyone else present at this conversation? A. No, just he and I.

"Q. What did you say, if anything?

"A. I didn't take to the idea at all.

"Q. What did you answer?

"A. Well, I told him that I had been dealing with the firm of Kagan & Gaines and that if I ever had that done I would work through them.

"Q. What did he say, if anything?

"A. He didn't say anything, but he asked me not to mention this conversation to Mr. Kagan.

"Q. Did you tell Mr. Kagan about this proposition?

"A. No, I didn't. I didn't want to aggravate him.

"Q. Did you order a copy of the violin from Mr. Kagan? A. Yes, eventually I did.

"Q. Do you know about when? [97]

(Deposition of Anthony Kovalkowski.)

"A. I guess it was about 1950 or so.

"Q. About how long after this conversation?

"A. About a month.

"Q. Do you know of your own knowledge who made this violin for you?

"A. Yes, this Alfio Batelli.

"Q. Was there any promise as to how long after the order this violin was to be ready?

"A. Yes, about two and a half months.

"Q. Was it ready in two and a half months?

"A. No. I remember I waited a very long while for it. I don't know how long. I know I got it the day before he sailed for Europe.

"Q. You waited almost a year, did you?

"A. I waited almost a year.

"Q. Did you pay Kagan & Gaines for this violin? A. Yes, I did.

"Q. How much did you pay them?

"A. $400.00.

"Q. Did you inspect the violin after you received it? A. Yes, I did.

"Q. Was it satisfactory? A. Not at all.

"Q. Would you tell us what, if anything, was wrong [98] with the violin?

"A. I inspected it. He made a copy of my Camilli, and his violin was not the same measurements at all. It was the most important thing to me to have an exact copy and another thing was that it was an inferior violin. The varnish was very bad, crudely made and it did not have good

(Deposition of Anthony Kovalkowski.)

sound. The tone was not good, but the workmanship was the worst of it.

"Q. What, if anything, did you do about that?

"A. I demanded my money back from Kagan & Gaines.

"Q. About how long after you received it?

"A. About a week later I saw Mr. Kagan and showed him the violin.

"Q. Did you tell Mr. Kagan at that time about your previous conversation with Mr. Batelli?

"A. When I complained, I also told Mr. Kagan about the previous proposition and I asked him to refund the money.

"Q. Was your money refunded by Mr. Kagan of Kagan & Gaines? A. Yes.

"Q. And you received your $400.00 back?

"A. Yes.

"Q. Are you aware of any other propositions made to any other musicians by Mr. Batelli? [99]

"A. Yes. I heard that he made propositions to several other musicians about working on the side.

"Q. Do you have any interest in Kagan & Gaines? A. No.

"Q. In other words, is your sole connection with them solely as a musician?

"A. That is right.

"Q. Are you appearing here voluntarily and of your own free will? A. Yes."

Signed, "Anton Kawalkowski, Witness."

The Court: All right, Mr. Schwartz.

Mr. Schwartz: Mr. Finston, will you stipulate that Mr. Batelli left the employ of Kagan & Gaines without notice?

Mr. Finston: Yes, I will.

Mr. Schwartz: Will you stipulate that he made five violins and sold them for $300.00 each on his own, without the knowledge of Kagan & Gaines? You can refer——

Mr. Finston: Would you mind repeating that question, please?

Mr. Schwartz: You can refer to Page 38 of his deposition, wherein he said he sold five instruments.

Mr. Finston: He may answer that. I will have Mr. Batelli on the stand in just a few moments. I don't remember exactly whether I can stipulate to that, but I will have Mr. Batelli on the stand with reference to that. [100]

Mr. Schwartz: Mr. Batelli.

The Clerk: Under 43(b)?

Mr. Schwartz: Under 43(b).

The Court: All right.

ALFIO BATELLI

the defendant herein, called as a witness under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, testified as follows:

Direct Examination

By Mr. Schwartz:

Q. You are Alfio Batelli, the defendant in this case? A. Yes.

Q. You were employed by Kagan & Gaines?

(Testimony of Alfio Batelli.)

A. Yes.

Q. While you were employed by Kagan & Gaines, you sold five violins without the knowledge of Mr. Kagan; is that correct? A. Yes.

Q. And the price you received for them was $300.00 a piece? A. Yes.

Q. It is a fact that you told Mr. Kagan that you were going to Europe to get your family over here?

Mr. Finston: We will stipulate as to that. [101]

Mr. Schwartz: Very well. It is stipulated that the defendant advised the plaintiff, through Mr. Robert Kagan, that he was going to Europe for the purpose of bringing his family over here, and that he was to return to work upon his return to this country. So stipulated?

Mr. Finston: I didn't get that last. That he would return——

Mr. Schwartz: That he would return to their employment.

Mr. Finston: I will stipulate to that.

The Court: How is that?

Mr. Finston: Yes, sir; so stipulated.

Mr. Schwartz: It is further stipulated, is it, that Mr. Batelli, at the time he so advised Mr. Kagan, had no intention of going to Europe?

Mr. Finston: I am sorry, Mr. Schwartz, but you had better ask that question.

The Court: I think you had better bring it out.

Q. (By Mr. Schwartz): At the time you told Mr. Kagan that you were going to Europe to bring

(Testimony of Alfio Batelli.)

your family over here, it is a fact, is it not, that you at that time had no intention of going to Europe? Is that correct?

A. In the time I told Mr. Kagan was many months before I left Kagan, I had the intention to go to Europe.

Q. At the time that you left, you did leave the firm and said goodbye to Mr. Kagan, did [102] you not?

A. In this time we had not any discussion.

Q. You told him that you were coming back?

A. We didn't have any discussion.

Q. Did you tell him how long you would be gone at the time you said goodbye?

A. Kagan knew it from, like I told that time, know it from four or five months before I left. He knew I want to go in Europa and that I can't remain over there one year, two year. I didn't say I will be back.

The Court: At the time you left, you didn't intend to go to Europe?

The Witness: No.

The Court: And at the time you left, your family was already in the United States?

The Witness: Yes; yes.

The Court: All right.

Q. (By Mr. Schwartz): And at the time you left, you knew that Mr. Kagan was under the impression that you were going to Europe to get your family; is that correct?

A. This I don't know, which impression he had.

Mr. Schwartz: I beg your pardon?

(Testimony of Alfio Batelli.)

Mr. Finston: He said he didn't know.

The Witness: I don't know.

The Court: I don't think it is material.

Mr. Schwartz: Very well. [103]

The Court: I think if he left, and without notice, it does not make any difference what excuse he gave. The fact that he may have said that he intended to go to Europe might indicate that he led them to believe that he might return. The fact remains that he left and did not return, and that is the point.

Q. (By Mr. Schwartz): Mr. Batelli, I show you what has been marked in evidence here as Plaintiff's Exhibit 3, and ask you whether that is your signature?

Mr. Finston: Pardon me. Is that the one that contains the 365-day notice, Mr. Schwartz?

Mr. Schwartz: Yes.

The Witness: Is this 365 days?

Mr. Schwartz: Yes.

The Witness: Excuse me?

Q. (By Mr. Schwartz): Is that your signature?

A. Yes.

Q. Is that Mr. Kagan's signature?

A. That is, I think.

The Court: It is admitted.

Mr. Finston: We are not questioning the genuineness of the signatures. I just want to know——

Mr. Schwartz: Very well. That is all I want to know.

Mr. Finston: If I may just look at the docu-

(Testimony of Alfio Batelli.)

ment to see that we are all talking about the same document. [104]

Mr. Schwartz: This is the same document that you produced at the first trial.

Mr. Finston: Is this the one—where is that 365-day notice?

Mr. Schwartz: Where is it?

Mr. Finston: Yes.

(Thereupon counsel indicated.)

Mr. Finston: Oh, yes, it is.

Mr. Schwartz: I have no further questions.

Mr. Finston: I have just one or two questions.

The Court: All right.

Cross-Examination

By Mr. Finston:

Q. Those five violins, Mr. Batelli, that you just recently testified you sold at $300.00 per violin, whose violins were they, yours or Mr. Kagan's?

A. It is mine.

Q. You had made those violins outside of Mr. Kagan's establishment?

Mr. Schwartz: I object to that as leading, if the court please.

The Court: He is still your witness. Because they cross-examined him, you cannot cross-examine him. You can examine him now, or examine him later, but you cannot cross-examine [105] him, because he is still your witness.

Mr. Finston: As a matter of fact, your Honor, I am only examining him now with reference to the same matters.

(Testimony of Alfio Batelli.)

The Court: That is true, but that is not cross-examination.

Mr. Finston: All right. Then I will wait.

The Court: You are not allowed to cross-examine. That is the rule, not only under 43(b), but that is also the rule under 2055 of the Code of Civil Procedure, which has been in effect for many, many years. I worked under it from 1927 to 1933 in the Superior Court. You can't cross-examine. You can examine him as to these matters, if you want to, but he is sill your client and your witness.

Mr. Finston: Yes.

The Court: They can cross-examine, but you cannot.

Mr. Finston: All right.

Q. Where did you make those five violins, Mr. Batelli? A. In my home.

Q. During what hours did you make those violins?

A. Sundays, in the evening, after I left the Kagan's.

Q. Where did you get the materials to make them?

A. I bought from Lewis & Son, Chicago.

Q. Who paid for the materials?

A. Myself.

Q. Whose money was it? [106]

A. Was my money.

Mr. Finston: That is all.

Mr. Schwartz: I have no further questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Schwartz: The plaintiff rests, your Honor.

The Court: All right.

Mr. Finston: On behalf of the defendant Batelli, your Honor, I would like to move the court at this point for the purpose of dismissing the cross-complaint.

The Court: All right. The cross-complaint will be dismissed.

Mr. Finston: I would like to make another motion at this point, your Honor, and ask the court's indulgence. I don't know if this is the exact and appropriate time to make the motion. I will ask this court to be good enough to make an order requiring the plaintiff, Kagan & Gaines Co., Inc., a non-resident, to file a cost bond pursuant to the appropriate section of the Civil Code.

The Court: The provisions of the Civil Code do not apply in Federal courts, and the Court of Appeals has so held even in cases relating to libel. I think Mr. Stacey can tell you that, because his judge made the ruling. They held that even in actions for libel, where summons cannot be issued unless you put up a bond for $500.00, it does not bind us, because [107] that is not carried over into our procedure.

Mr. Finston: Then I might be incorrect on this, but then may I renew the motion under Federal Civil Procedure, not being familiar with whether it is so provided or not.

The Court: Before you accept any more Federal cases, you had better familiarize yourself with the

procedure. There is no such provision. Furthermore, this is not the time to make that. When you are brought into court, you may have that right, but not after you have joined issue and gone to trial. The motion will be denied.

Mr. Finston: Mr. Batelli.

ALFIO BATELLI,

the defendant herein, called as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Finston:

Q. During the entire period that you were employed by the plaintiff, Kagan & Gaines Co., Inc., Mr. Batelli, were you employed by or did you work for any other person or company?

A. No, sir.

Q. Did you ever sell any string instruments, or any [108] other instruments at all, that belonged to Mr. Kagan without accounting for them?

A. No, sir.

Q. Did you ever take any of Mr. Kagan's materials in order to use them for the purpose of making violins, as you said you made at your own home? A. No.

Mr. Finston: I have no further questions.

Mr. Schwartz: No questions.

The Court: Just a minute. Any questions?

Mr. Schwartz: No, your Honor.

The Court: All right. Step down.

(Witness excused.)

Mr. Finston: The defendant rests, your Honor.

The Court: All right.

Mr. Schwartz: We move for a judgment, if the court please.

The Court: Let's have a short recess, and then I will hear any comments you want to make on the case.

(A short recess.)

The Court: All right, gentlemen, I will hear any argument you desire to present.

Mr. Schwartz: Your Honor, in support of my motion for judgment for the plaintiff here, I would like to simply observe that the case has devolved itself into a very simple situation, [109] where we have a claim that the contract has been breached by virtue of the failure of the defendant to give notice, as required. This has been admitted, and the only issue, it seems to me, that we have on hand is the question of damages.

I have itemized the various items of damage, as testified to by the plaintiff, and they are as follows, and I am itemizing them according to the testimony of the witness.

For advertising, as appears on Pages 16 and 17, the amount of $550.00.

The Court: I must have gotten the wrong figure. I had it $450.00. We will check them.

Mr. Schwartz: There are three items that make up to $550.00, your Honor.

The Court: All right.

Mr. Schwartz: For work on hand, the loss of

profit was between $500.00 and $700.00, and that appears on Pages 18 and 19.

For loss of customers, as referred to by the witness, a total gross business of $2,000.00, on which the profit would be between one-third and one-half, and, therefore, between $666.00 and $1,000.00.

On Page 24 he testified to a loss of profit of $700.00 on five violins.

The Court: What did you put that at?

Mr. Schwartz: Five violins. [110]

The Court: And what did you put that loss at?

Mr. Schwartz: $700.00. Two weeks' salary in the amount of $150.00.

The Court: Where does that come in?

Mr. Schwartz: I beg your pardon?

The Court: Where does that two weeks' salary come in? Oh, where he took a month instead of two weeks; is that it? Where does that two weeks' salary come in?

Mr. Schwartz: He was paid two weeks' salary on this so-called trip to Europe.

The Court: Oh, I see. That is it. All right.

Mr. Schwartz: Repair work loss, on Page 23, $750.00 profit.

Materials used, Page 24, $200.00.

Loss of business profit, $3,000.00.

And the five violins that were sold.

The Court: You are taking a double loss there. You are taking specific losses and then general losses.

Mr. Schwartz: This would come under the category of general damages.

The Court: Well, general damages must be proved as actual losses.

Mr. Schwartz: He testified, your Honor, that the volume of business dropped in this particular department of $10,000.00, on which there would have been, he estimated, a $3,000.00 [111] profit. That is a specific item of damage. These other items are pinpointed.

And, finally, these five violins that Mr. Batelli made and sold on his own account. On Page 24 the witness testified that there were five violins to be made by Batelli for five customers, and on which we had received deposits, and which we had to return, on which we would have made approximately $700.00.

Now, those are not the same five violins that Mr. Batelli made and sold on his own account. Therefore, the loss of profit—you can't charge him with the whole $1,500.00 which he got, but you can charge him for the profits which the firm would have made had these violins been sold in accordance with the contract by the firm, instead of by this man on his own account.

On that computation, your Honor, the total damages are between $7,217.00 and $7,750.00, the difference being on those two items, where he testified the profits would be between $500.00 and $700.00, and the profits on the other would have been between $666.00 and $1,000.00.

The Court: All right. Anything further?

Mr. Schwartz: No, your Honor.

The Court: All right. I will hear from you.

Mr. Finston: I have nothing further to say, your Honor.

The Court: This is a strange kind of a lawsuit, gentlemen. [112] It illustrates that at times when the court feels that a lawsuit which should be decided upon a narrow ground, with the possibility that if the rights of the parties are fixed, the parties themselves would be satisfied, it does not work out to prevent further litigation.

When I tried the case before, I specifically tried to avoid findings that would determine the merits of the action. I did make a finding that the defendant did not have any legal excuse for leaving the employment. However, I declined to make any findings as to damages. I did make a finding, which I felt was due the plaintiff in that case, negativing the charge that he had been induced by them to make fraudulent representations, or that he quit because he declined to encourage fraudulent representations. Let me find the exact finding.

Yes, I did make a finding that the plaintiff did not instruct defendant to create and insert false, fraudulent and/or misleading labels, or that the plaintiff did not instruct defendant to falsely appraise any musical instrument, and in amplification of findings 9 and 10 I found that "any statements which the plaintiff requested the defendant to make concerning violins which were imported in an unfinished state and then finished by the plaintiff did not exceed what is considered legitimate 'puffing' of one's merchandise. The defendant at no time informed the plaintiff that he would [113] termi-

nate the contract of employment if compelled to make such 'puffing' statements in the future. On the contrary, he continued in the plaintiff's employ after the first such alleged requests were made for over a period of three years, thereby waiving any right he may have had to terminate the employment because of such requests. The court further finds that the requests were not of a character that would degrade the plaintiff, and were not a legal ground for the termination by the plaintiff of his employment without notice."

I felt that in view of the charges made, which were repeated from the stand by the defendant in that case, that that finding should be made.

However, notwithstanding that, I did find that the agreement sued on was abandoned, and declined to make any findings on the issue of damages, and on any of the other issues, so that I found that the plaintiff was not entitled to recover in that case.

I may say for the record that in that particular case, when the attention of counsel was called to the fact that the evidence showed that the particular contract had been substituted for, and that there was in the record evidence from the plaintiff's file to that effect, counsel requested leave to amend, and I felt that I should not grant it at that stage. In view of what has happened since, I think probably that was a tactical mistake on my part. Technically, I was correct because pleadings [114] should not be amended except in extreme cases at the time of trial.

However, in that particular case I think it would have been justified and saved expense all around to everybody, and the time of the court, if leave to amend had been granted, even if it had required continuing the matter on the ground of surprise, assuming that counsel for the defendant had made such motion.

At any rate, the judgment of the court was entered on November 22, 1954.

Now, was this complaint filed before the other case was decided?

Mr. Schwartz: No, sir, afterwards. It was filed on——

The Court: Oh, it is May. I am sorry. I was looking at the wrong document. It was filed on the 5th of May, 1954.

Counsel immediately instituted this action, to which an answer was filed, and in the answer counsel in many respects repeated the charges made on the prior complaint as to fraudulent representation, and they appeared in the answer as to all counts, first, as to the first cause of action, and then carried over into the others, and then a cross-complaint was filed on the same date as the answer, which has since been dismissed.

The case presented by the plaintiff stands without contradiction. Evidently counsel is relying upon his objections to [115] practically the entire evidence, so far as it relates to the damages. The termination of the contract without the year's notice is admitted.

So the plaintiff is entitled to recover upon the

state of the record under any theory, because even if the court should find that no special damages have been proved, the court could award general damages, such as a jury might have awarded in a manner relating to any breach of a contract.

Of course, if the point made by the defendant is correct, and the evidence as to the special losses is true, then the damages would have to be limited to general damages under the first cause of action.

In dealing with a contract of employment, of course, the court must have some basis for making a general award, and it works both ways. The plaintiff, except in case the employee was discharged wrongly, cannot recover losses unless it is shown that they flowed from the discharge, and one of the ways of reducing the claimed damages is to show employment, and, ordinarily, the salaries paid and the profits that might have been made are the basis of damages.

I am satisfied with the rulings that I have made in regard to admitting these prior depositions, and I am going to find for the plaintiff, that the defendant terminated his employment without cause and without giving notice, and that the plaintiff has suffered a loss in profits which the court computes [116] as the sum of $3,000.00 in loss of general damage to the business or the profits they might have made, in addition to which the court finds that the plaintiff has also suffered special damages, such as loss of the expenditure for advertising, the customers' loss, and loss on the profits on violins in the sum of $2,750.00. So I am award-

ing $2,750.00 special damages, and $3,000.00 general damages.

The complaint, the way it is drawn, would seem to limit the special damages to $1,500.00, because they are carried over, and I will order, therefore, that the prayer of the complaint be amended to conform to the proof, by finding that the actual loss in dollars and cents amounted to $2,750.00. I have got them here as $550.00 for advertising, and I have a loss of $500.00, a customers' loss of $600.00, a loss on violins of $150.00, materials used $200.00, and then $750.00 additional losses. I haven't itemized them, but I checked them as they were given in that order, and the prayer may be amended in that respect. I am doing that so as to segregate the special damages from the prayer, because the special damages have got to be proved with a greater approximation than the general losses to the business. And I find that $3,000.00 is a reasonable amount to award as damages to the business generally by the termination of this employment without notice. You will prepare findings.

Mr. Schwartz: Yes, sir. [117]

The Court: The findings, under the rules, will be served on the other side, and then the other side will have five days in which to object, in accordance with the rules, and in that respect our rules conform to the rules of the State Court.

The Clerk: Also, the conclusion of law and judgment, your Honor?

The Court: Oh, yes, plaintiff's counsel will draw the findings and judgment. [118]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of April, A.D. 1955.

/s/ MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 38, inclusive, contain the original

Complaint.
Answer.
Cross-Complaint.
Answer to Cross-Complaint.
Findings of Fact & Conclusions of Law.

Proposed Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order & Affidavit for Extension of Time to Transmit and File Record on Appeal.

which, together with a full, true and correct copy of the Bond on Appeal; 1 volume of Reporter's Transcript of Proceedings had on March 9, 1955; and plaintiff's exhibits 1 to 5, inclusive, (Plaintiff's exhibit 1 consists of the Clerk's original file and exhibits & depositions in case No. 14787-Y); all in said cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 30th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14803. United States Court of Appeals for the Ninth Circuit. Alfio Batelli, Appellant, vs. Kagan & Gaines Co., Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14803

ALFIO BATELLI,

Defendant and Appellant,

vs.

KAGAN & GAINES CO., INC., a Corporation,

Plaintiff and Respondent.

APPELLANT'S STATEMENT OF POINTS

I.

USCA Title 28, Rule 26. (d)sec(4).

Substitution of parties does not affect the right to use depositions previously taken; and when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. (Emphasis Added.)

II.

Depositions Taken in a Prior Action May Be Used in a Subsequent Action Only When the Parties and Issues Remain Substantially Identical in the Subsequent Action.

Mid-City Bank & Trust Co. v. Reading Co. (1944) 7 FRS 26d, 62; 3 FRD 320.

Insul-Wool Insulation Corp. v. Home Insulation, Inc., (1949), 176 Fed. 2d. 502.

26 Corpus Juris Secundum 141.

Unruh v. Nelson,
297 Pac. 888.

Insured Life Fund Co. v. Ward,
77 Pac. 2d 890.

Code of Civil Procedure of the State of California, Sec. 2022.

III.

Depositions Taken in a Prior Completed Action May Not Be Used in a Subsequent Action; the Issues Are Not Identical.

United States v. Silliman,
(1946), 10 FRS 26d.62.

IV.

Depositions Taken in Other Actions May Be Used in a Subsequent Action Only When All Actions Arise Out of the Same Occurrence or When the Issues Are Substantially Identical.

Scotti v. National Airlines,
Inc. (1954), 19FRS26d.62.

Respectfully submitted,

/s/ SYDNEY S. FINSTON,
Attorney for Defendant and Appellant.

[Endorsed]: Filed August 1, 1955.

No. 14803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFIO BATELLI,

Appellant,

vs.

KAGAN AND GAINES CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFIO BATELLI,

Appellant,

vs.

KAGAN AND GAINES CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal by Alfio Batelli, defendant-appellant from a judgment entered March 29, 1955, in Case 16770-Y in the District Court of the United States in and for the Southern District of California, Central Division. This was an action for breach of contract in which the District Court had jurisdiction by reason of diversity of citizenship and the amount in controversy exceeded Three Thousand ($3,000.00) Dollars as is shown by the pleadings on page 3 of the Transcript of Record. This appeal is brought pursuant to 28 United States Code, Section 1291.

Statement of the Case.

Appellant is a maker of fine violins, who lived in Italy until 1947 when he came to this country and took up residence in Chicago, Illinois, where he was employed by appellee as a maker and repairer of string instruments until 1951. Appellee brought suit No. 14,787-Y in the United States District Court for the Southern District of California for breach of an employment contract. In this first action a judgment was entered on May 5, 1954, that plaintiff take nothing and that defendant recover costs, based upon the court's conclusion of law that the contract sued upon had been terminated by mutual agreement of the parties.

Appellee, Kagan and Gaines then instituted a second action based upon another contract signed by the parties [Ex. A, Tr. p. 9], which action is now being appealed from. At the trial of said action, appellee read in evidence a deposition of Robert Kagan, president of appellee corporation, which was taken in Chicago on December 9, 1954. In that deposition, the witness was asked whether he affirmed the answer he gave on the question of damages in a previous deposition taken in Chicago on February 9, 1954, for use in the aforementioned first action.

Appellee also introduced in evidence the entire deposition of this witness, which had been taken in Chicago on February 9, 1954, and the deposition of two other witnesses, Anthony Kovalkowski [R. p. 111] and Phillip

Scharf [R. p. 107] also taken in Chicago, all of which were taken in this first action which had terminated in a judgment that plaintiff take nothing. All these items of evidence, which were the only evidence produced by appellee on the question of damages, were allowed into evidence over the objection of appellant.

Specification of Errors Relied Upon.

Defendant-appellant brings this appeal on the ground that the trial court erred in the admission of two items of evidence:

1. The introduction into evidence of the question and answer in the second deposition in which the witness affirmed his statements in the first deposition. This may be found on page 54 of the printed transcript of record.

2. The introduction into evidence of the depositions taken in the prior completed action. This may be found on page 55 through page 59 of the printed transcript.

Appellant objected to the admission of both these items of evidence on the ground that they are inadmissible under Rule 26(d)(4) of the Federal Rules of Civil Procedure because they are hearsay evidence.

ARGUMENT OF THE CASE

I.

The Admission of This Evidence Violates Both the Language and the Spirit of Rule 26(d) of Federal Rules of Civil Procedure Because the Same Issues and Motives for Cross-examination Were Not Present in the Prior Action.

Rule 26(d)(4) provides:

> "Substitution of parties does not affect the right to use depositions taken; and when an action in any court of the U. S. or of any state has been *dismissed* and another action involving the *same subject matter* is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the later as if originally taken therefor."

This rule, which governs the use of depositions in the United States District Courts lays down two requirements, *both of which must be satisfied* by the proponent of the evidence before a deposition taken in a prior action may be used in a later action.

In interpreting the word "subject matter" in this statute, the courts have construed it to mean that the later action must be substantially between the same *parties* and must involve the same *issues* as in the former action. The rules of evidence are designed to exclude unreliable testimony, such as hearsay. The safeguards which the law sets up are the oath and the right of the adverse party to cross-examine the witness. In applying these safeguards, the courts have recognized that if the parties were different, or if the issues involved in the

two actions were not identical, the right of the adverse party to cross-examine in the later suit would be impaired. (*Mid-City Bank & Trust Co. v. Reading Co.,* 7 F. R. S. 26d 62, 3 F. R. D. 320.)

It is true that many courts, including some of the Federal Courts (*Wolf v. United Air Lines,* 12 F. R. D. 1 (D. C. Pa., 1951)) have adopted the more liberal rule expressed by Prof. Wigmore (5 Wigmore (3rd Ed.), Sec. 1388) under which the deposition may be used even though there is not an identity of parties, so long as there is an identity of issues. Appellant wishes to point out, however, that no court in the land has gone so far as to abolish the requirement of identity of issues.

In the present case, the issues in the two cases were not the same, so that the appellee has not satisfied this essential requirement of Rule 26(d)(4). The word "issue" is defined in Black's Law Dictionary (4th Ed.), page 965 as "the disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decisions of the proper tribunals. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side, and denied on the other, they are said to be at issue" (citing *Knaggs v. Cleveland-Cliffs Iron Company,* 287 Fed. 314). Similarly, other courts have defined an "issue" as a question, either of fact or of law, raised by the pleadings, disputed between the parties, and mutually proposed and accepted by them as the subject for decision. (*Riggs v. Chapin,* 7 N. Y. Supp. 765.)

Here, the *only question* to which the parties had narrowed their allegations by the pleading in the first action

was the appellee's right to recover *under the first contract* which had been terminated by mutual consent. This was the only matter mutually proposed and accepted by them as the subject for decision. The "issues" in the present case involve the right of appellee to recover under a *separate and distinct contract* entered into between the parties at a later date.

Appellant recognizes the fact that the two contracts were, to a very great extent, similar in content. This does not mean, however, that a skillful attorney would ask the same questions on cross-examination of the witness. Many courts recognize that even though two cases are based on transactions which involve many of the same facts, the line of questioning used in cross-examination would not be the same. (*Haglage v. Monark Gasoline and Oil Co.,* 221 Mo. App. 1129, 298 S. W. 117.)

A good illustration of this is *Oliver v. Louisville and N. R. Co.,* 17 Ky. L. Rep. 840, 32 S. W. 759, where in an action by a husband and wife for personal injuries to the wife, depositions taken in a former action by the husband against the same defendant for loss of services of the wife caused by the same accident were held to be inadmissible, though they related wholly to the character of the injury and manner in which it was received. The court stated:

> "While the reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the court might have taken defendant by surprise and deprived it of the advantage of developing on cross-examination, admissions and confessions of the wife it was not permitted to show in the other suit . . . more-

> over, defendant could not be legally deprived of an opportunity, afforded him by enforcement of the rule, to again cross-examine the witness."

As long ago as 1814, the Pennsylvania Supreme Court held that a deposition taken in an action of ejectment was not admissible in a subsequent action between the same parties which is *based upon another title, because the points of inquiry may be different,* and consequently it may be necessary to ask different questions of the same witness. This court in *Cluggage v. Duncan,* 1 Sergeant & Rawle's Reports 111 went to the heart of the matter when it said "So that, in truth, the two actions rest on different titles, and it might be doing injustice to plaintiff to introduce a deposition taken *under different circumstances.* The points of inquiry may be different and consequently, it may be necessary to ask different questions of the same witness." Similarly, in the instant case, many attorneys would wish to ask different questions if they knew that a different contract was involved.

Even Wigmore, who was the founder of the "liberal rule" which abolishes the need for identity of parties recognized that the *true test is one of identity of interest and motives in cross-examination.* In *Rivera v. American Export Lines,* 17 F. R. S. 26d 62, 13 F. R. D. 27 (Dist. Ct. N. Y., 1952), the court applied this test in the following language:

> "Are the issues in the two cases so similar that the attorneys for Export cross-examined the officers and crew of the Hellenic with the same *motive and interest* they would have had if they had been cross-examining the same witness in the action brought by plaintiff Rivera?"

Similarly, in the present case, the motives of an attorney conducting the cross-examination in a suit upon one contract may very likely be different from his motives in conducting the cross-examination in a suit based upon a different contract, which *will require the use of different trial tactics and strategy.*

In *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946), the contention was made that the defendant in this action, an attorney who conducted the cross-examination when a deposition was taken in a prior action had the same opportunity to cross-examine that he would have had if he had been a party to the prior action. The court said:

> "With this contention, the court cannot agree. To conclude that there had been an opportunity to cross-examine on the issues of the case, necessarily *presupposes as a fact that Silliman knew that he was himself subsequently to be the subject of the same charges of fraud. Such a supposition this court may not make a matter of speculation.*"

Applying this reasoning to the present case, how could appellant Batelli know at the time the depositions in question were taken that another suit would later be brought?

Appellant's attorney is now faced with precisely the same problem as was Silliman. An attorney owes a duty to his client to win the case with the expenditure of as little money as possible. Here, he found that he could win the case without putting his client to the unnecessary expense of attending the taking of depositions in a re-

mote city, because he knew that his opponent was suing on an abandoned contract. At this point *he had no way of knowing that another suit would later be brought,* and certainly he was under no duty to warn his forgetful adversary that said adversary was suing on the wrong contract.

When a second action is brought after much time has elapsed, the attorney now finds himself haunted by these depositions taken in the earlier action which had been completed, and is deprived of the opportunity of being confronted by the witness and of cross-examination. Certainly the attorney should not be penalized for trying to save his client, who is far from being wealthy, from what he justifiably thought were unnecessary expenses. Nor should the impoverished client be penalized by the use of these depositions, which were the only evidence in the case.

If we examine the reason for the dilemma of this attorney and his client, we can easily see that it is a recurrence of the same problem which was involved in *Cluggage v. Duncan,* and in the *Rivera* and *Silliman* cases. He has been caught off balance at the second trial because the issues and motives for cross-examination were not the same in both actions, even though they were based on facts which are somewhat similar. It was precisely to avoid such difficulties as this that thousands of cases have stated that the "issues and motives" must be the same, and Rule 26(d) requires that the "subject matter" must be the same.

II.

The Admission of This Evidence Contravenes Rule 26(d)(4) Because the Prior Action Was Not Dismissed, so That the Issues and Motives for Cross-examination Are Not the Same.

As pointed out by the Honorable Trial Court on page 59 of the printed transcript, the precise question involved here is one which has never before been presented under the Federal Rules of Civil Procedure, either in the Ninth Circuit or elsewhere in the courts of the United States. Therefore, this court should give serious thought to the language of the Rule and the intent of the committee which promulgated it before deciding this question.

The word "dismissed" as used in Rule 26(d) has acquired a definite meaning through many years of use. It is a final ending of a particular proceeding, but one which is *not a final judgment.* (*Taft v. Northern Transp. Co.,* 56 N. H. 417.) This word means that there has been no decision on the merits (*Wight v. Wight,* 272 Mass. 154, 172 N. E. 335) and has the same meaning as the words "discontinuance" or "nonsuit." (*Pear v. Graham,* 258 Mich. 161, 241 N. W. 865, and the many statutes which use these words interchangeably and are quoted at length, *infra.*) As your Honors know, these words mean that the proceedings are ended before the court has made any final decision, and often occur before the presentation of evidence has been concluded. Furthermore, the word "discontinuance" usually means that the *plaintiff himself* withdraws the case, which is a far cry from the final judgment in favor of appellant, which was entered after a full trial in the first action involved here.

In drafting this section of the Federal Rules in 1938, the only hint given by the Advisory Committee to the Supreme Court as to their purpose was the notation "Compare Equity Rule 64 and 2 Minn. Stat. 9835." Since Equity Rule 64 was worded very broadly and did not go into this matter in detail, we can only infer that the Committee meant to follow the lead of the Minnesota Statutes, which was renumbered Minn. Statutes Annotated of 1949, Section 597.16, and which goes into the matter in great detail, using the same language. This section (which is now Rule 26.04 Minn. Rules of Civil Procedure) reads as follows:

> "When an action is *discontinued or dismissed,* and another action for *the same cause* is afterward commenced between the same parties or their respective representatives, all depositions lawfully taken for the first action may be used in the second in the same manner and subject to the same conditions and objections as if originally taken therefor provided the deposition has been duly filed in the court where the first action was pending and has ever since remained in its custody."

This section has existed in the Statutes of Minnesota ever since 1858, when courts were established in that State and has always been interpreted to exclude depositions taken in a prior proceeding that has been completed by an adjudication on the merits. The only concession which those courts have made is to say that a judgment on the pleadings was in effect, a dismissal. (*Watson v. St. Paul City Ry.,* 76 Minn. 358, 79 N. W. 308.) They have not interpreted this statute, which is very similar to Rule 26(d)(4) to allow the use of depositions taken in a prior completed action in which a full trial was had,

as in the case at bar. The judicial system of Minnesota has operated very well since its establishment, and litigants have been able to prove their cases without the use of such flimsy evidence as these depositions.

The codes of many other states also cover this point, as for example:

Idaho Code of 1932, Section 16-922 (now Sec. 9-922) provides that a deposition duly filed may be used in another action, *after dismissal for the same cause of action,* between the parties or their assigns or representatives.

Other statutes accomplish the same purpose, by using similar language. Florida Statutes of 1941, Section 91.28, provides:

> "When the *plaintiff* in any suit shall *discontinue it* or become nonsuited, and another suit shall afterwards be commenced for the same cause of action between the same parties or their respective representatives, all depositions lawfully taken for the first suit may be used in the second, in the same manner and subject to the same conditions and objections as if originally taken for the second suit."

Hawaii Statutes of 1945, Section 9868, provide that a deposition is admissible, after *nonsuit or discontinuance,* in another suit for the same cause of action between the same parties or their representatives.

To the same effect is Burns Indiana Statutes of 1933 (1946 Replacement), Section 2-1523.

Appellant's research discloses no cases in which any of these statutes have not been interpreted as written.

The Texas Statute, which is Rule 213, Texas Rules Civil Procedure, goes even further and provides that depositions may be read upon the trial "of any suit in which they are taken," and the courts have construed said statute to allow use of a deposition only in the trial for which it was taken or in the retrial of the same cause of action.

Let us now stop to think of the reason why the Advisory Committee to the Supreme Court which drafted the Federal Rules and the framers of all these other statutes used the language which they did. If depositions may be used after the first action has been dismissed, we may readily infer that they cannot be used when the case has resulted in a final judgment on the merits, since we know the meaning of the word "dismissed" as explained at the beginning of this section of appellant's brief. It should be obvious that they meant to exclude depositions taken in a prior completed action *because the issues and motives for cross-examination are not the same.* Your Honors know that as a practical matter of strategy and trial tactics, there are innumerable ways in which a skillful attorney's handling of the two cases would differ.

This is precisely what occurred in the case at bar. Appellant's attorney who sought to win the case for his client with a minimum of expense to his client, has, in effect, been punished for being solicitous of his client's

welfare, by the use of depositions taken in a prior completed action. At the second trial, he finds himself powerless to attack the depositions which were the sole evidence produced by appellee. Appellant submits that it was precisely such matters as this which were in the minds of the Committee which drafted the Rules. They realized that the high cost of expenses involved in litigation was one of the factors which would cause an attorney to have different motives for cross-examination or cause him to decide not to cross-examine at all. It would be contrary to the intention of the framers of this statute to allow such flimsy evidence, which was the sole evidence in this suit, to win the case for appellee.

There has been extremely few cases in the Federal Courts involving this section. The few cases in which it has come up (*Eller v. Mutual Benefit Health & Accident Assoc.,* 1 F. R. D. 280 (Dist. Ct. Iowa, 1940); and *Cervin v. W. T. Grant Co.,* 100 F. 2d 153 (5th Cir., 1938)), were all cases in which the depositions were taken in actions in state courts which were dismissed when the cases were removed to the federal courts. There has been no case which allowed the use of depositions taken in a previously completed action which terminated in a judgment on the merits as in the present case.

In discussing this rule, the leading writers on the subject are in agreement with appellant's position. Pike and Willis, in their article "The New Federal Deposition—Discovery Procedure" in 38 Columbia L. Rev. 1436 at page 1450 (1938) say "In most of the decided cases on the question the first action had been in fact dismissed. Those in which it was otherwise disposed of seem doubtful on the score of identity of parties or issues." This is pre-

cisely *the reason* for the Committee's use of the word "dismissed." An example of how depositions taken in a prior completed action may not be used in a subsequent action because the issues are not identical may be seen in *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946).

Volume 4, Moore's Federal Practice (2d Ed.), page 1200, states only that the deposition of a party taken in a prior *dismissed* action may be used in the Federal Court by an adverse party, but makes no mention of the use of depositions from a prior completed case.

It may be that the Honorable Trial Court was mistaken as to the disposition of the first case. At page 106 of the printed transcript, he stated:

> "I am going to rule that all the depositions in the other case are admissible, because the other case was not decided on the merits, but was really a dismissal of the action on the ground that the evidence showed that the contract had been abandoned."

The wisdom of the trial court's ruling in the previous case is not before us at the present time, and the fact remains that a judgment that the plaintiff take nothing was entered in that case, so that there was no dismissal, and these depositions do not come within Rule 26(d)(4).

Appellant believes that the trial court's ruling on this question was in contravention of the language of the statute and of the obvious intention of the framers of the statute which was to insure that the motives of the attorney conducting the cross-examination are the same in both actions.

III.

These Depositions Are Hearsay and Are Otherwise Unreliable Evidence, the Use of Which Is Very Dangerous to the Extent That It Should Not Be Condoned by This Court.

The hearsay rule is defined in 5 Wigmore (3rd Ed.), Section 1364, as

> "that rule which prohibits the use of a person's assertion as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, *where he may be probed and cross-examined* as to the grounds of his assertion and of his qualifications to make it."

Again, in Section 1365, he says the essential requirement of the rule is that statements offered testimonially must be subject to the test of cross-examination.

Thus, even in the decisions supporting the general rule that there must be substantial identity between the parties and issues in order to render the testimony or the deposition of a witness admissible, it is brought out again and again that the fundamental reason for such requirement is the necessity that there has been full opportunity to cross-examine. (*Warren v. Nichols,* 7 Met. (Mass.) 261; *Fredericks v. Judah*, 73 Cal. 604, and other cases cited in Anno. 142 A. L. R. 674.)

Our courts have repeatedly stated that a deposition is a substitute or second best, not to be used when the original is at hand, for it deprives the litigants of the advantage of having the witness before the jury. (*Arnstein v. Porter,* 154 F. 2d 464, at 470 (2nd Cir., 1946).)

In *Untermeyer v. Freund,* 37 Fed. 342, the court phrased it very neatly by saying:

> "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."

In the *Arnstein* case, the court stated:

> "As a deposition cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration, it is or it may be, the dead body of the evidence, without its spirit."

For this reason, the courts have refused to allow the use of depositions to prove events which may be proved by a witness available in person who is subject to cross-examination. (*Va. & W. Va. Coal Co. v. Charles,* 251 Fed. 83, aff'd 254 Fed. 379; *Holt v. Werbe,* 198 F. 2d 910 (8th Cir., 1952).) In *United States v. Silliman,* 10 F. R. S. 26d 62, 6 F. R. D. 262 (Dist. Ct. N. J., 1946), the court points out that a deposition taken without opportunity to cross-examine is in effect a mere affidavit, and is not admissible as evidence at the trial.

Furthermore, all depositions are hearsay, and are admitted only because the testimony is given under oath, and because the opponent has been given an opportunity to cross-examine the witness (5 Wigmore (3rd Ed.), 1940, Sec. 1377, and article entitled "Use of Depositions in Later Actions" in 5 Stanford L. Rev. 535).

If this is so, how reliable can a deposition be which consists of the witness's affirmation of what he said in

a previous deposition, as was done in this case? This is an example of "hearsay upon hearsay" and is totally unreliable.

The value to the trier of the facts, whether judge or jury, of the opportunity to see and hear the witness is recognized in many cases. (*Holt v. Werbe,* 198 F. 2d 910 (8th Cir., 1952).) Since a deposition is merely a substitute or second best when taken in the same case for which it is used, it is completely unreliable when it is sought to be introduced in a later case after long periods of time have elapsed.

As pointed out earlier, this is a question which has not come up previously under the Federal Rules of Civil Procedure. Therefore, appellant respectfully requests that this court give serious thought to this matter before it allows the admission of such flimsy evidence, and hands down a decision which may have serious repercussions in the future.

An affirmance of the judgment below would mean that this court condones the use of a practice which can lead to much abuse, since a plaintiff could use the practice followed in this case whenever two similar contracts are involved. Also, it would be extremely easy for a litigant to bring a suit on a fictitious contract, taking a deposition which he knows that the defendant, *who has been lulled into a false sense of security,* will not contest, and then to bring a second action in which he could be victorious by using this deposition, with respect to which his opponent has had no real opportunity of cross-examination.

Other situations exist which lend themselves to even greater abuse. As your Honors know, in determining whether multiple causes of action exist, California and many other states follow Pomeroy's theory that every time a primary right is invaded a cause of action arises. If there is an auto accident in which the plaintiff's person is injured and his car is damaged, California says there are two causes of action because two primary rights have been invaded—the right to freedom from injury to personal property and the right to freedom from his person. It would be extremely easy for a plaintiff who has a weak case to first bring a suit for the minor damages to his car. In this suit, he could take depositions in some remote place, knowing that his opponent's California attorney will not attend the taking of the deposition because the expenses of doing so would be disproportionate to the amount sought to be recovered in the suit and because defendant knows plaintiff's case is weak. At this deposition, plaintiff could say anything he liked, whether true or false, and without being cross-examined. After losing the first suit, plaintiff would then bring his second action in which he seeks to recover a much greater sum of money for the injuries to his person. He would then win his case by the use of the depositions taken in the first action because the court would say that the defendant has already had his opportunity to be confronted by and to cross-examine the witness.

Appellant therefore requests that the court give serious thought to this matter before condoning such practices

which may have these dangerous consequences. Resourceful attorneys can find many ways of disarming their opponents of their most powerful weapons by willfully creating the sequence of events which happened in this case, and placing a defendant in a position where he is powerless to attack a deposition which may be very unreliable, and may be the only evidence in the case. In deciding this appeal, this court is in a position to prevent a practice which is almost certain to have drastic consequences.

Respectfully submitted,

SYDNEY S. FINSTON,

Attorney for Appellant.

No. 14,804

IN THE

United States Court of Appeals

For the Ninth Circuit

PEGGY RAY WALKER KINGSTON,
Appellant,

vs.

M. S. McGRATH,
Appellee.

APPELLANT'S OPENING BRIEF.

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No. 14,804

IN THE

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PEGGY RAY WALKER KINGSTON,
Appellant,

vs.

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Appellee.

APPELLANT'S OPENING BRIEF.

This action was brought by appellant, a California resident, to recover damages allegedly resulting from medical malpractice in the diagnosis and treatment of critical neck and back injuries sustained by her in an automobile accident occurring in the State of Idaho. Appellee, a practicing physician and surgeon of that state, was the doctor in charge of her case during her subsequent hospital confinement. The trial was before a jury, and at the conclusion of appellant's evidence on the sixth trial day, the Court granted appellee's motion for a dismissal under Rule 41(b), Federal Rules of Civil Procedure, and rendered judgment for costs against appellant, from which judgment this appeal is prosecuted. There were other defendants, but this appeal is only as to the judgment in favor of the appellee, M. S. McGrath.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court: Original jurisdiction over this action was based solely upon diversity of citizenship and was conferred upon the trial Court by 28 U.S.C. Section 1332.

Jurisdiction of this Court to review the judgment upon appeal: 28 U.S.C. Section 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1294 provides, in part, that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

The pleadings necessary to show the existence of jurisdiction are the complaint (R. 2), the amendments thereto (R. 11 and 23) and the answer filed jointly by the appellee and other defendants (R. 18).

The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question on appeal have been heretofore alluded to, and will be given more detailed consideration in the following summary and statement of the case.

STATEMENT OF THE CASE.

The automobile mishap which caused the injuries for which appellant was hospitalized occurred on Sunday

morning, October 19, 1952, in the vicinity of Weiser. She was then a single woman in her late forties, and had for many years held a responsible position with one of the large retail stores in downtown San Francisco (R. 38-39). She was returning to California after a week's vacation in Idaho (R. 39) and was being driven by friends from Council to the airport at Boise (R. 40). The driver, in swerving to avoid other vehicles on the highway, drove the car onto a shoulder where it went out of control and overturned in an adjoining field (R. 42). Appellant was thrown out and was rendered unconscious. When she recovered her senses she was lying in the field in great pain and was unable to move her head. She was later taken by ambulance to the nearby Weiser Memorial Hospital (R. 43).

Dr. McGrath was already at the hospital when the ambulance arrived (R. 118). The hospital had a fully equipped X-ray department (R. 120-121) and he had the injured lady carried directly to this room. A technician employed by the hospital took X-ray films, under the doctor's direction, of her chest and ribs, and also two views of the cervical spine. The latter films were one taken from front to rear (anterior-posterior), and also a lateral view (R. 119).

She was then moved to a private room and was in a state of shock for three or four hours following her hospital admission (R. 123). She complained of excruciating pain in her neck, radiating up into the back of the head, and rib injuries were also suspected (R. 118). It was the doctor's impression that she

probably had a neck fracture (R. 121). He endeavored at the beginning of her hospital stay to place her in a neck brace or harness that he had lying in his office (R. 122). This caused her such intense pain, however, that it was impossible to apply it (R. 47).

It was the practice at the hospital to send X-ray films to an outside radiologist for analysis and interpretation. The X-rays initially taken at the hospital were sent to the offices of Dr. Judson V. Morris, a radiologist in Boise. His report was received some four or five days later (R. 128). It was negative with reference to the films taken of the cervical spine. An anomaly in connection with the sixth thoracic or dorsal spine was noted in the report concerning the film of the chest and ribs, however (R. 131). This was referred to in the report as follows:

> "About the mid-point of the thoracic spine there is a mild scoliotic list toward the right side. This appears secondary to asymmetry in vertical dimension in its right portion. *This could be congenital but possibility of injury is not ruled out.*"

In the impression given at the conclusion of the report, the examiner again referred to the evidence of lack of symmetry in the vertebræ at this level, and stated that "this could easily be congenital but *possibility of compression injury is not ruled out.*"

Despite this report, no further attempt to use the X-ray as an aid to diagnosis was made until November 5th. At this time, a lateral view of the thoracic spine was procured, again under the direction of Dr. McGrath (R. 138). This was the only film that

was taken, and no films of the cervical region were requested on this occasion. Another radiologist, Dr. Norman Bolker, of Nampa, who did most of the work for the hospital, examined this film the following day while he was there on one of his regular weekly visits (R. 139). His reading resulted in a positive finding that there was a *compression fracture of the body of the sixth dorsal vertebra* "with anterior wedging so that the anterior width is approximately one-fourth the posterior." He also found that the picture revealed that there was kyphosis, or forward angulation, centered at the point of the compression fracture (R. 145).

With this X-ray evidence of a broken back, the patient was then immediately placed in hyperextension, with her back arched forward, for several days, and she was later strapped in a body brace (R. 147). In the meantime nothing whatever was being done about her neck complaints. Notwithstanding the constant agony that this injury was causing, she was allowed to suffer for an entire month without anything being done in the way of treatment or further diagnosis in so far as the injury was concerned.

Dr. McGrath finally decided on November 18th to have further X-rays of the upper spine taken. This was a series of six films of the skull and cervical vertebrae (R. 332-33) and were likewise read by Dr. Bolker (R. 149-153). These X-rays were taken because of "increase in pain" in the patient's neck and back of her head (R. 151). This was the first time that any X-rays of her neck were taken since the initial X-rays

on October 19th. There were findings in the radiologist's report rendered on this occasion of a bony pathology in the first cervical vertebra. The report pointed out that what appeared to be defects in the laminae of the dorsal arch seemed to be "developmental in origin," however, and "it is believed that the odontoid process* is intact but section view of the neck and lateral projection will be retaken to verify this conclusion" (R. 153).

On November 20th a final series of X-rays, consisting of four lateral views of the neck was taken and shown to Dr. Bolker. These X-rays, according to his report which was received by Dr. McGrath on November 26th, revealed that appellant had, in fact, suffered multiple fractures of the upper cervical vertebrae. The report concluded with the following impressions:

> "Fracture of odontoid process of second cervical vertebrae (sic), with posterior displacement of the process, with several fractures in the lamenae (sic) of the first cervical vertebrae (sic). A previous lateral view of the neck taken with the neck in extension produced a reduction of this dislocation fracture so that it was not apparent on examination of 10/19/52." (R. 156.)

On November 25th, the day before Dr. McGrath received the X-ray confirmation of the crucial nature of the neck injuries suffered by appellant, he had already contacted Dr. Burton, an orthopedic physi-

*The odontoid process is a bony projection upward from the second cervical vertebra which articulates with the atlas, and upon which it rotates.

cian and surgeon practicing in Boise, to arrange for a consultation with him at the Weiser Hospital on the following day (R. 165-166). The X-ray report was on hand when Dr. Burton arrived the next day, and he informed the patient in the presence of Dr. McGrath as to the seriousness of the situation.

A full body cast which held the entire neck, back and spine rigid was prepared and was applied by Doctors Burton and McGrath on November 30th (R. 168-170).

On December 5th, her 47th day at the Weiser Memorial Hospital, she was discharged as "unimproved" and taken by train under the care of a nurse to Notre Dame Hospital in San Francisco (R. 65). The final diagnosis entered in the records of the Idaho hospital was "fracture first and second cervical vertebrae—fracture sixth dorsal vertebrae (sic) (compression)—multiple bruises and abrasions" (Pltfs. Exh. 1).

Upon her arrival at Notre Dame Hospital appellant was placed under the care of her family doctor, Dr. James Clifford Long, and Dr. John J. Loutzenheiser, an orthopedic specialist (R. 70).

Dr. Loutzenheiser's testimony was produced at the trial in the form of a deposition. He testified that the fractures at both levels were demonstrated by X-rays taken at the time of her admission to the Notre Dame Hospital, and that a dislocation of some 15 degrees was found in the fracture of the odontoid process (R. 166).

The patient was immediately placed in traction in an endeavor to straighten out her spine. An attempt was also made to gradually extend her thoracic spine in order to overcome the compression. There was some success in the treatment of the cervical spine, but because of the time that had elapsed since the injury nothing could be done to bring about any improvement in the thoracic spine (R. 370-371). There was also considerable nerve root damage due to the compression at the level of the thoracic spinal injury which caused intense pain radiating up into the patient's chest (R. 373-375).

She left Notre Dame Hospital on February 1st and was last seen by Dr. Loutzenheiser in September of 1953. There had been no change in a period of over six months, and the doctor regarded the disabilities that she then had as being permanent in character (R. 376-377). It was his opinion, moreover, that additional disturbances could be expected to recur in the lumbar spine at a later date because of the alteration of body mechanics resulting from her injuries (R. 377).

Appellant has been left with a badly deformed and painful back, and has difficulty in rotating her neck (R. 377, 408-409, 449). Her activities are very restricted and she has never been able to return to her employment (R. 73). Thirteen months after her accident she was married to Norman J. Kingston, a sergeant in the U. S. Air Force, and now resides with her husband in Merced, California. She testified, how-

ever: "I am still not a wife to the man. I am hoping for the day I will be able to be" (R. 104).

Commencing on the evening of her fourth day in the Weiser Memorial Hospital, plaintiff went through a period of several days during which she was mentally disoriented and confused. We mention this because Dr. McGrath testified that, on the basis of his experience as county physician with common drunks in the county jail, he believed that this lady was at the time suffering from delirium tremens (R. 228). We submit that there is absolutely no evidence in this case to support this odious slur, and if there was a semblance of truth to this insinuation it would not even constitute the slightest excuse for neglect on the part of a doctor in furnishing his patient with proper medical care.

In addition to her own testimony, appellant relied on testimony coming from the following witnesses: Dr. M. S. McGrath and Dr. Judson B. Morris, both of whom were called under Rule 43(b), Federal Rules of Civil Procedure; Dr. Robert M. Coats, a physician and surgeon on the staff of the Weiser Memorial Hospital; Dr. John J. Loutzenheiser of San Francisco; Mrs. Sidney Cox, her twin sister, who came from Fairbanks, Alaska, to testify on her behalf; and her son, Gardner P. Wood. Other pertinent facts shown by the testimony of these witnesses will be discussed and correlated to the points to be covered by the argument which follows.

Appellant rested at the completion of her case and defendant thereupon presented his motion to dismiss on various grounds, all essentially based upon the alleged insufficiency of the evidence (R. 450-453). The Court granted the motion after hearing oral argument. Thereafter, appellant moved for leave to reopen her case as to appellee, M. S. McGrath, for the purpose of offering further evidence, and for reconsideration of the order granting the motion to dismiss as to him, both of which motions were denied (R. 453-456).

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in its order granting the motion of the defendant, M. S. McGrath, under Rule 41(b), Federal Rules of Civil Procedure, for dismissal after the evidence had been presented on behalf of plaintiff, and in rendering judgment in favor of said defendant thereon.

Specification No. 2.

The order and judgment appealed from are contrary to law and the evidence.

Specification No. 3.

The Court erred in denying plaintiff's motion to reopen the case and for reconsideration of the order for dismissal of the action as to the defendant M. S. McGrath.

Specification No. 4.

In rendering its order and judgment for dismissal as to said defendant, M. S. McGrath, the Court invaded the province of the jury.

Specification No. 5.

Plaintiff was denied her right to a trial by jury under the Seventh Amendment to the Constitution and Rule 38(a), Federal Rules of Civil Procedure.

ARGUMENT.

A. ON APPEAL FROM AN INVOLUNTARY DISMISSAL OR NONSUIT AT THE CONCLUSION OF PLAINTIFF'S CASE, THE PLAINTIFF IS ENTITLED TO THE MOST FAVORABLE INFERENCES DEDUCIBLE FROM THE EVIDENCE, AND SINCE THERE WAS VERY SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD HAVE FOUND THE APPELLEE GUILTY OF MALPRACTICE, THE DISTRICT COURT ERRED IN GRANTING THE MOTION.

On a motion to dismiss by the defendant after the plaintiff has completed the presentation of his evidence in a jury case, the Court must consider all the evidence *in the light most favorable to the plaintiff* and may grant the motion only if, *as a matter of law,* the evidence is insufficient to justify a verdict for the plaintiff. This rule is necessary to keep the right to a jury trial inviolate.

Jacob v. City of New York (1942), 315 U.S. 752, 62 S.Ct. 854;

Moran v. Pittsburgh-Des Moines Steel Co., CCA 3 (1948), 166 F. 2d 908, certiorari denied 334 U.S. 846, 68 S.Ct. 1516;

Weintraub v. Rosen, CCA 7 (1938), 93 F. 2d 544;

5 Moore's Federal Practice (2d Ed., 1948), § 41.13[4].

For purposes of this review, conflicts must therefore be ignored, and the evidence, with all reasonable inferences resulting therefrom, must be regarded in the light most favorable to appellant's contentions. When so considered, we earnestly believe that it must manifestly appear that appellant was entitled to have the jury pass upon the issues as to malpractice in this case.

Without repeating facts already presented, the following is a brief summary of some of the additional testimony that would seem to lead inevitably to this conclusion.

Appellant, as a witness on her own behalf, testified that the greatest pain that she suffered upon her admission to the hospital was in her neck and chest (R. 45-46); "I had to pick my head up to move it from one spot on the pillow to the other"; that on the first night of her hospitalization Dr. McGrath attempted to put some kind of apparatus over her neck, but that "it hurt me so bad all I did was scream and scream" (R. 27); "that every time I told Dr. McGrath, 'Dr. McGrath, my neck, I can't stand it' he said to me, 'Those are bruises and when bruises come to the surface they hurt worse'" (R. 48); that on the second hospital day she was told that she could walk around the bed or go to the bathroom, and that

she could leave the hospital as soon as she was able to walk (R. 46); that she was wrapped in Ace bandages for the suspected rib injuries, but that nothing whatever was done for her neck and back (R. 48); that on the third or fourth day she was told by the doctor that "as soon as I could walk I could go down to a hotel in Weiser, rest there, and then I could go on home"; that for "weeks and weeks" she "tried to walk around the bed and I would hold my head"; that after four or five days "I sort of went out of my mind" (R. 50); that after she came out of her delirium "my neck kept getting worse every day" and that she kept the doctor continuously informed as to her complaints; that she futilely suggested to the doctor that "two heads" might be better than one (R. 53); that the doctor finally told her that she had a broken back and had her immediately placed in hyperextension (R. 59); that after the back brace was applied she was told: "you have got to walk every day to get your strength and learn to walk in this back brace"; that she continued to complain constantly about her neck (R. 60) and that "my head wouldn't go down like this. It hurts too bad and I had to hold it all the time" (R. 61); that after weeks of torture Dr. Burton finally arrived and said "You are walking around with a broken neck and a broken back"; that Dr. Burton said to her: "You don't realize it, but if you would sneeze you would paralyze yourself from the neck down" (R. 64); that after being placed in the body cast she was transferred to the Notre Dame Hospital in San Francisco, and that after leaving that

hospital she continued to wear a back brace for two and one-half to three months, and a neck brace for another four or five months (R. 71).

Dr. M. S. McGrath, called as a witness under Rule 43(b), testified that he had been a licensed physician and surgeon for 17 years (R. 111); that he was one of the five regular members of the medical staff of the Weiser Hospital (R. 113); that he was in general practice and treated fractures, but that ordinarily he would refer known spinal fractures to a specialist (R. 116, 158); that he was only familiar with one text-book on the subject of orthopedics (R. 252-253); that upon his first examination of the patient, he suspected neck injuries, and also possible injuries to the fifth and sixth ribs on the left side (R. 118); that the patient "was having very severe pain in her neck, radiating up her neck into the back of the head" (R. 118-119) and that she also had pains in the left side of her chest (R. 121); that "I suspected she probably had a fracture" (R. 124); that she was kept under drugs and sedatives because of her intense pain (R. 122, 186, 246, 247); that he did nothing to immobilize her injured neck after suggesting that she wear a neck brace (R. 134); that he knew that immobilization of the injured area was important in treatment of neck injuries (R. 159); that the usual symptoms of a neck fracture were "pain, may have instability of the head, may not be in proper position, or may not be angulation or asymmetry" (R. 164); that when he received the negative X-ray he began to feel that she "possibly didn't have a fracture in the cervical region" (R. 142);

that even if X-rays are negative, a physician should still treat the patient's symptoms (R. 165); that the longer fractures of the spine remain untreated, the greater the damage that should be expected (R. 250).

Dr. Robert A. Coats testified that he was a physician and surgeon on the medical staff of the Weiser Memorial Hospital; that he was familiar with the usual standards of practice maintained in the hospital (R. 286); that the X-ray is not an infallible aid to diagnosis, and the first X-rays do not invariably reveal existing fractures (R. 287, 301); that if a suspected fracture is not disclosed by the initial X-rays, more films should be taken (R. 301); that a delay of weeks in treatment would materially affect the degree of recovery from spinal injuries of the kind here involved (R. 308-309).

Dr. Judson B. Morris, called under Rule 43(b), testified that since X-ray films are on three planes, superimposed on each other, there are many problems in X-ray technique that often affect the accuracy of the result; that there are many factors, including positioning and technique, which may affect the value of the radiograph as an aid to diagnosis (R. 319-320); that the probable reason why the fracture of the odontoid process could not be seen in the X-rays taken on October 19th was due to the position in which they were taken (R. 330).

Mrs. Sidney Cox testified that she learned of her sister's accident on October 21st (R. 387); that she immediately left Bend, Oregon, where she was then

living, and arrived at the hospital the following Wednesday (R. 389); that she found her sister holding her head and "complaining terribly about her neck" (R. 388); that she was told, however, that her sister only had broken ribs, and that there was nothing to worry about, so that she returned to Bend the same night (R. 388); that she received a phone call from the hospital after she arrived home, however, and immediately returned to the hospital, arriving Friday at about 1:00 A.M. (R. 393); that, on this occasion her sister talked strangely, and, at times, incoherently (R. 393-394); that she still held her neck and complained of pain (R. 395); that in a private conversation with the doctor while she was visiting her sister, she told him that "I am terribly worried about my sister, don't you think it might be well if we could call another doctor in?" but that he replied that there was "nothing to worry about" (R. 396); that she saw her sister the following Saturday morning, and that she had fully recovered from her hallucinations (R. 397); that Dr. McGrath again came into the room while she was there and stated: "Your sister is all right now" (R. 398); that her sister continued to complain about her neck, however, "It was her neck, her neck, and every minute, 'Sidney, it is my neck, something is wrong' " (R. 397); that she stayed with her sister until Saturday night, when she again returned to Oregon (R. 398); that her next visit to the hospital was at Thanksgiving time, when she was accompanied by appellant's son (R. 398); that they then learned that it had been finally determined that she

had a broken neck (R. 398-399); that before her hospitalization, her sister was very straight, but that she now has a "fearful hump" in her back; that she is "very, very bent, very curved and that there are some bones protruding" (R. 409).

Gardner P. Wood testified that he was the son of the appellant and was 24 years of age (R. 430); that at the time of the accident he was in the military service and was stationed in Okinawa; that he learned of his mother's accident and injuries on November 10th after returning from overseas (R. 434); that he immediately contacted Dr. McGrath by telephone and was told that his mother had a broken back, but that she was in a brace and walking every day, and that there was nothing to be alarmed about (R. 434-435); that he arranged a furlough and arrived in Weiser for a two-day visit with his mother on or about November 18th or 19th (R. 432); that he found her in great pain, complaining of her head, and crying (R. 433); that he had a further conversation with Dr. McGrath at the hospital and stated to the doctor: "Dr. McGrath, don't you think it advisable to get another doctor, just look at my mother, I don't like the looks of her" (R. 436); that he next visited with his mother on November 26th, the day before Thanksgiving (R. 436); that it was then that they learned that she had a broken neck as well as a broken back (R. 437).

In considering this testimony, it must be borne in mind that this is a case in which a patient with a broken back received no treatment for this condition until she had been in the hospital for *18 days,* although

her doctor received an X-ray report a few days after he assumed responsibility for her care indicating that there was a possibility of compression injury; a case of a lady with a broken neck which was not discovered or treated in any way until her *39th hospital day,* despite the fact, as shown by the evidence, that from the time that she was first admitted she had constant symptoms and complaints indicating the presence of serious injury in that area.

From the foregoing testimony, there was ample evidence from which the jury could have found the appellee guilty of malpractice on each and all of the following theories:

(a) Failure to exercise due care and skill in making his diagnosis of appellant's injuries, and in not making proper use of available X-ray equipment and other diagnostic facilities.

(b) Negligence in the care and treatment of appellant's known injuries, and in failing to immobilize her or otherwise protect her from further aggravation of her injuries until a more definite diagnosis could be made.

(c) Negligence and breach of duty in failing to inform appellant as to the serious character of her injuries, and in failing to suggest consultation with an orthopedist.

There was not only strong evidentiary support for each of these theories of recovery, but they are all sustainable under the authorities, to which we now turn for analysis.

B. IT IS THE DUTY OF A PHYSICIAN AND SURGEON TO USE REASONABLE CARE AND SKILL IN DIAGNOSIS AND TO MAKE PROPER USE OF AVAILABLE DIAGNOSTIC AIDS FOR THIS PURPOSE.

There is a fundamental difference in malpractice cases between mere errors of judgment and negligence or lack of skill on the part of a physician and surgeon in diagnosis and treatment. The rule of immunity based upon "error of judgment" does not apply if the physician and surgeon does not exercise due care in making his diagnosis, or if he is negligent in assembling data essential to a proper discharge of his duties in that regard. The foregoing rule of sound medical practice is universally recognized and may be stated by way of general application in the following language from the law encyclopedias:

> "It is one of the fundamental duties of a physician to make a proper skilful and careful diagnosis of the ailment of a patient, and *if he fails to bring to that diagnosis the proper degree of skill or care, and makes an incorrect diagnosis, he may be held liable to the patient for the damage thus caused just as readily as he must answer for the application of improper treatment.*" (Emphasis added.)
>
> 41 Am. Jur. 209; Physicians and Surgeons, §92, Diagnosis.

> "Although generally malpractice arises because of the negligent conduct of a physician, it is not necessarily limited to acts of negligence, but may result from lack of skill or neglect to apply it, and such neglect or lack of skill may be applied to

a single act, or any *entire course of treatment.*" (Emphasis added.)

70 C.J.S. 954; Physicians and Surgeons, §40, Negligence and Malpractice, Definitions.

These principles were recognized and followed by the Idaho Supreme Court long ago in the leading case of *McAlinden v. St. Marie's Hospital* (1916), 28 Idaho 657, 156 P. 115. The plaintiff there suffered comminuted fractures of the bones of the right leg in a logging accident. While he was under the care of the defendants he developed a gangrene in the injured limb, and his leg was amputated. He claimed that this was due to negligence in his treatment and care, and was awarded a judgment following a trial by a jury.

In holding that the trial Court had properly denied the defendants' motion for a nonsuit and for a directed verdict, the Idaho Supreme Court said, at page 675:

"And in 30 Cyc 1578, note 92, and case cited, the following rule is laid down: 'Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skilful as such, but *whether he has treated the case skilfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession.*

"As is stated in the case of *MacKenzie v. Carman,* 92 N.Y.Supp. 1063: 'The law thus requires the surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, *and to apply that skill and learning with ordinary and reasonable care.*

> "Whether the appellant's physician and surgeon possessed and exercised that degree of skill and learning possessed by the average member of the medical and surgical professions in good standing in the community, and used that reasonable care and diligence according to his best judgment in treating respondent's injured limb that the average member of the profession would have used, are *questions of fact* exclusively for the jury to determine." (Emphasis added.)

A later expression of the policy of the Idaho courts with regard to the duties and responsibilities of physicians and surgeons may be found in the frequently cited case of *Flock v. J. C. Palumbo Fruit Co.* (1941), 63 Idaho 220, 118 P. 2d 707. There, the Court stated:

> "The measure of responsibility for care, treatment, hospitalization, etc., resting upon appellant contract physician under this contract is at least equal to that resting upon a physician and surgeon in the exercise generally of his profession. That standard has been fixed by this court, under both sections 43-1107 and 43-1108, as the exercise of the care and skill ordinarily exercised by competent physicians and surgeons in the same or like locality, *in the light of present day learning and scientific knowledge of, and professional advancement in the subject.*" (Citing numerous authorities, including *McAlinden v. St. Marie's Hospital Assn., supra.*) (Emphasis added.)

The Idaho Court, in arriving at its decision in the *Flock* case, places particular emphasis on and quotes extensively from the North Dakota decision in *Tevedt*

v. Haugen (1940), 70 N.D. 338; 294 N.W. 183. In the *Tevedt* case, the Court held that a doctor who does not have the facilities or training to properly treat fractures, but who knows that treatment by a specialist would be more likely to be successful, is under a duty to advise his patients of these facts. The following pertinent language is from the opinion of the North Dakota Court.

> "* * * According to the evidence the defendant recognized at once when he was informed of plaintiff's consultation with Dr. Oppegardst at Crookston, that the situation required the services of a bone specialist, but *he had never called this to the attention of the plaintiff before.* See, Beardsley v. Ewing, 49 N.D. 373, 382, 383, 168 N.W. 791, 793, 794. The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and *the duty of a doctor is not fulfilled merely by utilizing the means at hand* in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give." (Emphasis added.)

The Federal case cited in another connection above (*Weintraub v. Rosen,* 93 F. 2d 544, *supra*) presents facts that are very much in point here. That case

originated in the United States District Court in Illinois. The plaintiff was brought to a hospital in Springfield after an automobile accident in which she suffered serious injuries, including a skull fracture which endangered her life for several days. She also suffered a fractured hip, but this was not diagnosed until after she was discharged from the hospital about a month later.

The District Court directed a verdict in favor of the attending physician, on the theory that his first duty was to save the patient's life, if possible, and that examination or treatment of her hip while she was in the hospital suffering from injuries of more immediate severity would have added to the danger. In reversing this judgment, the Circuit Court held that the facts were sufficient to establish a *prima facie* case of negligence with respect to the injury to the hip, and that *the burden shifted to her physicians to show a proper excuse for their failure to make* a further examination or diagnosis. The following statement is from page 547 of its opinion:

> "Aside from the injury to the patient's head there can be no doubt that appellants established a prima facie case of negligence, with proximately resulting damages. It may be conceded that the injury to her head prevented an examination and treatment of her hip sooner than five days after the injury. However, this record discloses that the patient was in a condition to undergo an examination of her hip when she regained consciousness.
>
> * * * * *
>
> "We may safely assume from the evidence, therefore, that appellees were negligent in not

observing the condition of the patient's hip. *They owed her the duty of making such examination and giving her such treatment as her physical condition and the skill of their profession in that community warranted. They did nothing so far as the injury to her hip was concerned either in the way of curative or palliative measures.* This fact speaks loudly in support of appellants' contention that they made no examination and had no knowledge of the fracture. To conclude otherwise would be unjust to appellees." (Emphasis added.)

C. FAILURE OF A PHYSICIAN AND SURGEON TO MAKE PROPER USE OF X-RAY FACILITIES AS AN AID IN DIAGNOSIS IN CASES OF DOUBT, RENDERS HIM RESPONSIBLE TO THE PATIENT FOR ALL INJURIES AND DAMAGE RESULTING THEREFROM.

Failure by a physician and surgeon to make adequate use of X-ray equipment as an aid to diagnosis of bone and other injuries has been held actionable in every jurisdiction in which the point has been the subject of judicial review. The leading case on the subject is, perhaps, the California decision in *Reynolds v. Struble* (1933), 128 C.A. 716; 18 P. 2d 690. The appeal was from a judgment in favor of the plaintiff, a structural steel worker who injured his left arm and received other injuries as the result of a fall. He was taken to a hospital and his attending physician *immediately had X-rays taken of the injured area.* After studying the X-rays, notwithstanding the fact that the patient complained of great pain in his

arm and protested when the doctor manipulated it, the physician assured him that he had no fractured bones. He was discharged from the hospital a few days later with his arm still painful and disabled. Subsequently, it developed from an examination by someone else that he had multiple fractures involving the entire structure of the left shoulder and its inclusive processes. His arm was permanently injured by reason of the negligence in treatment, and a judgment in his favor was affirmed. *The original diagnosis made by the doctor was merely bruises and contusions and the plaintiff's only treatment while under the care of the defendant physician consisted of rest and general care.* The Appellate Court pointed out, in its opinion, that there was evidence that the X-rays taken when the patient was admitted to the hospital, if carefully examined, would have disclosed the fractures. After discussing this point, however, the opinion states:

> "And it is likewise in the record, beyond dispute, that the exercise of ordinary skill and care such as possessed by physicians and surgeons practicing in that community would have required *further examination and the taking of further X-ray pictures* to determine the true condition of the patient. (P. 723.)
>
> * * * * *
>
> "There is further evidence that ordinary skill and care required the use of the X-ray as an essential aid to a skilful diagnosis, employing that skill and care possessed and used by the ordinary practitioner in that community. Indeed, it might be almost said that *the use of the X-ray as an aid to diagnosis, in cases of fracture or other indi-*

cated cases, is a matter of common knowledge. Even the layman, when injured, on his own accord seeks the X-ray. And under the rule of *Jacobson v. Massachusetts,* 197 U.S. 11 [25 Sup. Ct. Rep. 358, 49 L. Ed. 643, 3 Ann. Cas. 765], *the court could, in the absence of testimony, take judicial notice of this scientific advancement.*

"We have no hesitation in holding, under the evidence adduced, that there is sufficient in the record for the jury to have concluded that when the patient left the hospital, in the condition in which he was, that he was then *the victim of the unskilful diagnosis and that he had not received that skilful care which the doctor impliedly held out to him.*" (P. 725) (Emphasis added.)

The *Reynolds* case has been followed by a number of later decisions by the California Courts, in which there have been similar holdings. Among them are the following:

Lashley v. Koerber (1945), 26 C.2d 83, 156 P.2d 441;

Agnew v. City of Los Angeles (1947), 82 C.A.2d 616, 186 P.2d 450;

McBride v. Saylin (1936), 6 C.2d 134, 56 P.2d 941;

Burford v. Baker (1942), 53 C.A.2d 301, 127 P.2d 941;

Stanhope v. Los Angeles College of Chiropractic (1942), 54 C.A.2d 141, 128 P.2d 705.

This Court, in applying the domestic law of Idaho in *Moore v. Tremelling* (1938), C.C.A. 9, 100 F.2d

139, sustained a judgment for negligence in the treatment and diagnosis of a fractured femur, largely on the basis of evidence of failure to make adequate use of the X-ray as an aid to diagnosis.

The Ohio case of *Kuhn v. Banker* (1938), 133 Ohio St. 304, 13 N.E.2d 242, was among the authorities cited by the Idaho Supreme Court in *Flock v. J. C. Palumbo Fruit Co., supra.* There, X-ray films taken on the patient's arrival disclosed an intra-capsular fracture of the neck of the left femur. The fractured limb was placed in a splint and about 5 days later another X-ray picture was taken, which showed that the fracture had been reduced and that the shaft was in normal position. A few weeks later, still another X-ray was taken which showed a bony union with the parts in good position. The lady left the hospital about 10 days later, complaining of considerable pain in the leg, which was still in the splint. After some post-operative care, the physician finally told her to get up and walk, warning that if she did not she might have a stiff leg. The lady's complaints continued, however, and she complained of a grating in the injured area. However, the doctor did not advise further X-ray films and an X-ray examination at another hospital some time later disclosed that there was no bony union of the broken parts. The Appellate Court held that the circumstances disclosed by the evidence were sufficient to require the submission of the issue of the defendant's negligence to the jury, but the judgment of the trial Court, directing a verdict on other grounds, was affirmed.

Wilson v. Corbin (1950), 241 Ia. 500; 41 N.W.2d 702, is an Iowa decision in which the factual context before the court was very similar to that here involved. The plaintiff in that case suffered a fall in which he landed in a sitting position. The accident occurred on May 14, 1946, and he sustained a compression fracture of the third lumbar vertebra, although the injury was not correctly diagnosed until August 12, 1946. Plaintiff was taken to a hospital operated by the defendant doctor at Corydon, a small community, to ascertain the extent of his injury. It was contemplated that if there were any broken bones he would be taken to the State University Hospital in Iowa City, about 170 miles from Corydon. The next day an X-ray was taken of plaintiff's pelvis and the fourth and fifth lumbar vertebrae. This was a view from front to rear (anterior posterior). It did not include a view of the third lumbar vertebra. However, after receiving the X-ray report, the defendant doctor assured the injured man that there were no broken bones and that it was unnecessary for him to be taken to Iowa City. Plaintiff remained in defendant's hospital for 6 days and *no other X-rays were taken and no further examination was made.* This, although he constantly complained that the pain did not subside and he was unable to sit up at the time of leaving the hospital. At the close of plaintiff's evidence, a verdict was directed for defendant, mainly on the ground that plaintiff had failed to establish by expert testimony the standard of medical care applicable to Corydon or similar community, and that the negligence charged

as against defendant was not the proximate cause of plaintiff's damages. The following quotations are from the decision in which the Appellate Court reversed the trial tribunal:

> "It has been repeatedly held that a physician's failure to take X-ray pictures, or have them taken, an an aid to diagnosis when X-ray machines are available and commonly used by physicians in similar cases may be actionable negligence. (Citations.)
>
> "... Indeed use of the X-ray as an aid to diagnosis of bone injuries has been held a matter of common knowledge. (Citations.) See also *Flock v. J. C. Palumbo Fruit Co.,* 63 Idaho 220, 118 P.2d, 707, 715." (Emphasis added.)

We conclude this part of our discussion with the following apt quotation from *Stagner v. Files* (1938), 182 Okla. 475; 78 P.2d 418, in which the Oklahoma Court affirmed a judgment for failure to make adequate use of X-ray in following up a shoulder injury:

> "While it is true that the expert medical testimony introduced on behalf of the defendant tended to prove that it was not customary to make an X-ray picture to determine whether the joint was in place, and that the same was not usually necessary, yet, *there was evidence to the effect that this was the best method for such a determination and the defendant himself admitted that when there was any question about the existence of a dislocation, an X-ray picture should be made.* Since the testimony on behalf of the plaintiff tended to show that the defendant attended him during the intermediate period in question, and

that his shoulder was dislocated at that time and that the defendant did not discover it, we then must see if there was any evidence from which negligence on the part of the defendant could be inferred in failing to discover the dislocation then. *If, by the methods known to him, he could have discovered the dislocation, then he was negligent in failing to use such methods.* The chiropractor testified that from an examination she found the shoulder to be dislocated. *If the circumstances were such as to create any doubt as to whether or not the shoulder was in place during the period complained of, then, according to his own testimony, the defendant was negligent in having failed to take an X-ray picture of the joint."* (Emphasis added.)

D. WHERE MALPRACTICE IS ALLEGED AND PROVED IN CONNECTION WITH THE TREATMENT OF INJURIES RECEIVED IN AN ACCIDENT, THE BURDEN IS ON THE DEFENDANT TO LIMIT THE RECOVERY BY SHOWING THE EXTENT TO WHICH THE CONDITION COMPLAINED OF IS ATTRIBUTABLE TO THE PRIOR ACCIDENT.

Defense counsel frequently claims that the plaintiffs have the burden of proving what portion of their alleged damage was due to the original ailment, and what portion to the alleged negligence, and that failing so to do, they cannot recover. Such is not the law. The injured party establishes a prima facie case when he has shown that there is a probability that there was an aggravation of his original injuries due to malpractice. The burden then shifts to the defendant to show the extent to which damages may be

attributal to circumstances other than the bad results. The correct rule is, as succinctly stated in the case of *McCormick v. Jones,* 152 Wash. 502; 278 Pac. 181, as follows:

> "Negligence having been established from which bad results would naturally follow, *the burden is on the respondent (doctor) to limit the recovery* by showing that the pain and suffering were the result of intervening causes." (Emphasis added.)

The California Supreme Court pointed out in this connection in the case of *Ash v. Mortensen* (1944), 24 C.2d 654; 150 P.2d 856, that since an injured party is not ordinarily entitled to a double recovery from both the driver and the doctor where he has been negligently treated for injuries received in an automobile accident, the medical practitioner has *"the right to show what damage, if any, was actually suffered by reason of malpractice"* and to have the jury's award limited to such damages in the malpractice suit.

We also quote the following rather pertinent language on the subject of proof of damages from *Stagner v. Files,* supra:

> "The defense counsel further asserts that even though it were admitted that the evidence was sufficient to show that the defendant was negligent, there was absolutely no evidence whereby the jury could say whether the condition of the plaintiff's arm was due to the character of the original injury or to the defendant's lack of skill and care in treating it. This contention does not

take into consideration the undisputed fact that the condition of the dislocated shoulder was aggravated by neglect or failure to relocate it and allowing it to remain dislocated over a period of months, and that *the plaintiff's chance of permanent absolute recovery was thereby greatly decreased. It also overlooks the prolonged suffering which such neglect caused. It is true that the condition of plaintiff's shoulder is not entirely due to neglect and lack of care in its treatment, but it cannot be and is not denied that said condition was aggravated thereby and that the plaintiff suffered a definite detriment from same.* While it is true that there was no evidence introduced which would enable the jury to approach mathematical accuracy in the determination of just how much worse the condition of the plaintiff's shoulder was rendered by the defendant's negligence, yet, *as the evidence discloses that some change in it was thereby created to the plaintiff's detriment accompanied by the prolongation of his pain and suffering, his recovery is not defeated by the impossibility of accurately measuring such detriment.* It is fundamental that when the cause and existence of damages is established with certainty, recovery thereof will not be denied because of difficulty in determining their exact amount." (Emphasis added.)

In *Reinhold v. Spencer* (1933), 53 Idaho 688, 700; 26 P.2d 796, where it was contended in a malpractice suit that there was no competent evidence to show "that respondent suffered damage by reason of any act of negligence on appellant's part," and that the trial Court should have granted a non-suit or motion

for a directed verdict, the reviewing Court replied as follows:

> "Damages, if any, flowing from an injury such as respondent sustained, that is, for pain and suffering and loss of income due to the particular injury, are susceptible to proof *only with an approximation of certainty,* and *it is solely for the jury to estimate them as best they can by reasonable probabilities* based upon their sound judgment as to what would be just and proper under all of the circumstances, which may not be disturbed in the absence of some showing that the jury were biased or prejudiced or arrived at the amount in some irregular manner." (Citing cases.) (Emphasis added.)

Similar expression may be found in many of the decisions cited above, including the *Moore, Weintraub,* and *Wilson* cases.

CONCLUSION.

In holding that the trial Court in that case had usurped the functions of the jury in granting a motion to dismiss at the close of plaintiff's case, the Supreme Court of the United States in *Jacob v. City of New York* (1942), 315 U.S. 752, 62 S.Ct. 854, *supra,* prefaced its opinion with the following statement:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether

guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

The questions presented by the evidence in this case definitely should have been submitted to the jury for determination under proper instructions. Appellant's constitutional right to trial by jury has been abrogated as a result of the judgment and orders appealed from. The judgment should therefore be reversed.

Dated, San Francisco, California,
November 1, 1955.

Respectfully submitted,
TOBRINER, LAZARUS, BRUNDAGE & NEYHART,
D. L. CARTER,
Attorneys for Appellant.

IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14,804

PEGGY RAY WALKER KINGSTON,
Appellant,

vs.

M. S. McGRATH,
Appellee.

APPELLEE'S BRIEF

J. F. MARTIN and C. BEN MARTIN,
Boise, Idaho

DONART & DONART,
Weiser, Idaho,
Attorneys for Appellee.

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SUBJECT INDEX

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APPELLEE'S BRIEF

NATURE OF CASE

This action was brought in the name of Peggy Ray Walker against appellee, M. S. McGrath, a physician and surgeon residing and practicing his profession in Weiser, Washington County, Idaho; Washington County, Idaho and City of Weiser, a municipal corporation, jointly conducting business as the Weiser Memorial Hospital at Weiser, Idaho; Dr. Norman Bolker, licensed physician specializing in radiology at Nampa, Idaho; and Dr. Judson B. Morris, a licensed physician specializing in radiology and roentgenology.

The trial commenced on March 8, 1955 against

all of the defendants except Dr. Bolker who was at that time in the military service of the United States. At the conclusion of all of plaintiff's evidence the court sustained motions to dismiss as to the defendants, Dr. McGrath and Dr. Morris. (T-453) This appeal is presented to this court as to the defendant and appellee, Dr. M. S. McGrath, only.

STATEMENT OF THE FACTS

We are unable to accept the statement of the case as presented by the appellant for the reason that it is not only incomplete and inadequate as a fair statement of the case made by the appellant but is more of an argument than a statement of facts.

We deem it essential to a proper understanding and decision of this case to make a rather full statement and analysis of the evidence, particularly the medical testimony presented by the appellant, because if the appellant is to prevail the reason must be found in the medical testimony presented by the appellant at the trial.

THE EVIDENCE

The appellant identified herself as Mrs. Peggy Ray Kingston, a married woman of forty-seven (47) years of age, residing at Merced, California. She came to Council, Idaho for a vacation as the guest of one Jackson Soden on Monday night, October 13, 1952. (T-39). She stayed at Council until Sunday morning, October 19, 1952, and left the latter place in an automobile in which three others

were riding. The party left approximately around eight o'clock A. M. (T-40), but the appellant did not remember going through Weiser (T-41) nor did she know the kind of an automobile in which she was riding (T-42).

Some distance south and east of Weiser the car in which appellant was riding left the highway, turned over and came to rest out in a field (T-42) and as a result the appellant was thrown out of the car and was rendered unconscious, and in addition sustained injuries to her fifth and sixth ribs on the left side and injuries to the cervical and thoracic spine.

Appellant was taken to the Weiser Memorial Hospital by ambulance and placed in the x-ray room by the appellee, Dr. McGrath, and at the time she was suffering severe pain.

"A. Well, the worst pain was my neck. That was the worst pain I had, and if I tried to sit up at all my chest, I couldn't breathe."

"Q. Were there cuts and bruises about your body, or ribs, or any place?"

"A. My left leg was bruised, and my hand, my left hand." (T-45).

Dr. McGrath suggested putting a neck brace upon the appellant to relieve the tension and pain.

A. "He told me he had worn one once, and why didn't I try that. Of course, it hurt me so bad all I did was scream and scream, not to hurt my head

any more—move my head any more."

Q. "When you protested he didn't put it on; is that correct?"

A. "No."

Q. "Did he ever suggest it again while you were in the hospital?"

A. "No, that was the only time * * * (T-47).

Some four or five days following the admission of appellant into the hospital she commenced having hallucinations and lapsing into a delirious condition.

Q. "Now after you were there for a period, we will say four or five days, or whatever it was, did anything of an unusual nature happen?"

A. "Well, I sort of went out of my mind. I am not sure—I think it was Wednesday or Thursday." * * * *

Q. "Will you tell us generally what you recall during this particular period?"

A. "Of taking my bag and breaking the window and stepping out on the grass, and Doctor McGrath bandaging my hand, and being very gentle with my feet, so not to cut my feet on that grass because I was going to be—getting help is what I was groping for, and I believe that was a Thursday, and I remember Saturday morning before eight o'clock, thinking, 'Oh, where am I?' The nurse said, 'You are in a hospital,' and I said, 'What hospital?' And she said, 'You are in Weiser', and I said, 'I am still here in Weiser Hospital?' She then said, 'Yes,' and from there on I

wasn't in shock again, I——" (T-50).

About two and a half weeks after the appellant was in the hospital, she was placed in what she referred to as "hypotension". This was after additional xrays had been taken and the sixth thoracic vertebra was found to be compressed. (T-59) Also at this time a back brace was made and fitted to appellant and a short time thereafter, Dr. Burton, an orthopedic surgeon of Boise, Idaho, was called, and he placed the appellant in a body cast. (T-64)

Thereafter, (December 5, 1952) the appellant was placed on the train and taken to San Francisco via Portland where she was admitted to the Notre Dame Hospital under the service of her family doctor, James Clifford Long, (T-68) and Dr. John J. Loutzenheiser, an orthopedic surgeon. (T-69)

At the Notre Dame Hospital she was xrayed, and the first thing Dr. Loutzenheiser did was to place appellant's head and neck in a cast, "so my neck wouldn't go up or down or over to the sides or move". (T-70)

Dr. Loutzenheiser also had made for the appellant a back brace which she wore when she got up and walked.

"Q. "For approximately how long after you left the hospital did you continue to wear these braces or apparatus that you described?"

A. "Well, I wore the—I wore the neck brace for a long time. The back brace—after about

two months Dr. Loutzenheiser said that they couldn't seem to get anything that didn't hurt me terribly with it, and to try and just wear it when I went out, and if I couldn't go out—of course, I had to wear it in the taxi to and from the doctor's office, to try and lie down most of the time, and only put it on for ten of fifteen minutes, and see if I could stand the pain of it."

Q. "Well, for how long altogether approximately did you wear these braces or either of them?"

A. "Well, I think this back brace probably about two and a half or three months, and then the neck—the collar thing, I finally got after about four or five months that if I laid still during the day or walked very carefully so I wouldn't jar myself I only had to wear it at night, and I wore it at night for another, I guess three or four months, just to sleep in." (T-71)

The foregoing evidence was elicited on the direct examination of the appellant, and on cross-examination the following was added.

The body cast which Dr. Burton placed on the appellant was removed by Dr. Loutzenheiser who placed the patient in a back body brace, which apparently was the same kind of a brace as the appellant had had at the hands of Dr. McGrath, save and except that it did not extend as high on the shoulders and it laced somewhat differently in front. (T-85-87)

In the appellant's discussion of the neck brace

which Dr. McGrath tried to put on her, she refused to permit Dr. McGrath to do so and finally stated, "He didn't get it on me, let's put it that way." (T-87)

At the Notre Dame Hospital under the service of Dr. Loutzenheiser, the latter "did put a collar and an extension on your neck?"

A. "I should say so."

Q. "Did he ask you or did he tell you?"

A. "He had already known I had a broken neck."

Q. "Please answer my question. Did Dr. Loutzenheiser ask you if you would consent to that or did he tell you he couldn't do it?"

A. "He just did, I don't think he asked me or told me." (T-88)

With reference to the statement of Dr. McGrath's that the delirium and hallucinations which the appellant developed and suffered commenced four or five days after her injury was in fact delirium tremens, the appellant testified (T-93) that she did not keep track of the liquor she consumed at Council.

"A. "When you are supposed to be enjoying yourself you don't count them." * * *

Q. "You would drink there and stay in those bars until one o'clock in the morning when they closed?"

A. "Not every night, Saturday night I did." * *

Q. "And that was the last day of your vacation and celebration?"

A. "Yes."

With reference to the hallucinations the appellant testified:

"A. "Water bugs is the only thing I can remember, when I would go to the bathroom I could see on the floor." * * *

Q. "And you saw people and talked to people that were not there?"

A. "No."

Q. "You don't remember that, or do you?"

A. "I thought people outside the window were trying to help me." (T-97) Appellant further stated that this was the only experience she had had of such a nature.

"Q. "You haven't had before or since such a severe injury as you received in that automobile accident, have you?"

A. "No." (T-98)

On cross-examination the following appears:

"Q. "Now are you telling the jury that a cocktail or two before dinner and five drinks of whiskey after dinner did not make you intoxicated?"

A. "No, I don't believe it bothered me because I was on a vacation. I could sleep late every morning, stay in bed as long as I wanted to." (T-107)

Thomas A. Breshears was the next witness called by the appellant and identified himself as the Manager or Administrator of the Weiser Memorial

Hospital. This witness was not connected with the hospital at the time the appellant was a patient but by stipulation, while the witness was on the witness stand, the hospital record and the xray films taken at the hospital together with the radiologist's reports were marked for identification. (T-110)

Dr. M. S. McGrath, the appellee in this case, was called by the appellant under Rule 43(B), and was subjected to a searching examination covering every detail of his training, experience and care of the appellant, and his testimony covers 172 pages of the transcript, being pages 111 to 283 inclusive.

Inasmuch as this appeal hinges around Dr. McGrath, we feel it not only proper but in order and helpful to substantially review the doctor's testimony. He has carried on a general practice of medicine in Weiser, Idaho, and the vicinity thereof for seventeen years. The five doctors residing in the vicinity of Weiser make up what they refer to as members of the hospital staff. (T-113) No specialists reside at Weiser, and the closest orthopedic surgeon is in Boise, Idaho, eighty-five or ninety miles away. (T-116)

On Sunday, October 19, 1952, Dr. McGrath received a call to come to the hospital on an emergency. He did not know who called him nor did he know the appellant. (T-117) The appellant was taken to the xray room in a conscious condition although she was in shock. (T-118) Two xray films of the cervical spine and one of the thoracic cage were

taken of the appellant at the direction of Dr. McGrath. After xray films were taken the appellant was moved to a private room. She was still complaining of pains in her neck radiating to the back of her head and pains in her chest. (T-121) The doctor suspected a neck injury and attempted to put a cervical brace on the appeallant's neck. (T-123)

"A. "It was a brace, with the pads holding the chin and also the back of the head with pads over the shoulders to hold the neck and the head absolutely rigid." (T-124)

The attempt by Dr. McGrath to put this brace on the appellant was made just as soon as he could go to the office and get the brace and go right to the hospital. (T-125) This was probably around 12:00 o'clock noon. When examined by Mr. Lazarus with reference to this brace we find the following:

"Q. "Did you actually try to put it on, or did you show it to her?"

A. "I showed it to her and explained to her what it was for, but I did not force it on her."

Q. "You didn't try to put it on, am I correct?"

A. "I did not force it on her."

Q. "Was any attempt made to put it over her, or around her in any way?"

A. "No, I wouldn't force it on her."

Q. "In other words, you showed it to her and suggested to her there—"

A. "I suggested it be worn." * * * *

Q. "Was there much discussion about it, or did

she just say, "No", or what did she say?"

A. "She swore and said, "I won't wear that thing."

Q. "What did she do?"

A. "She swore."

Q. "You are quite sure she swore?"

A. "Yes." (T-127)

Four or five days after the xrays had been taken the report was received from the radiologist, Dr. Morris. (T-128-129) This report is not only in evidence as one of the exhibits, but is found at pages 131-132 of the transcript. Stripped of the verbiage the two cervical xray films showed, 'no evidence of fracture, luxation or subluxation". The report in connection with the thoracic film stated:

"Faintly visualized is evidence of a symmetrical vertical dimsension in the right and left portions of the sixth thoracic body. This could easily be congenital but possibility of compression injury is not ruled out."

Examined about any further attempt to immobilize the neck, Dr. McGrath stated:

"A. "The following morning I asked to put the splint on again, the cervical splint." * * *

Q. "Did you try to put it on?"

A. "I did not try to force it on." * * *

Q. "Do you remember what the patient said?"

A. "She refused to let me apply it."

Q. "Did you insist on it?"

A. "I wasn't going to force it on her."

Q. "In other words, you showed it to her, the patient, and told her you thought she should wear it and when she protested you dropped the subject?"

A. "I couldn't force the treatment on her."

Q. "Did you tell her again the reason why you thought it was advisable for her to wear it?"

A. "I told her she needed it." (T-133) * * *

Q. "Did you give any instructions to any of the nurses with regard to using steps to immobilize the area where you thought the injuries occurred?"

A. "She had ice packs placed along each side of her neck for relief of pain and to immobilize her head."

Q. "How long were those ice packs kept there?"

A. "Not very long because she threw them off."

Q. "Did you leave instructions that they be replaced?"

A. "They were replaced."

Q. "How long were they supposed to be there at a time?"

A. "They were to be kept on constantly." (T-134)

On November 5th additional xray films were taken of the thoracic area. (T-138) At this time the neck pains were subsiding. The patient had been told when she entered the hospital not to get out of bed but she did not follow the instructions "and I instructed the nurses that I would rather see her

get up with help than for her to get up on her own accord. It would be better to do that than try to restrain her and keep her in bed." (T-141)

And again speaking of the thoracic injury, Mr. Lazarus questioned Dr. McGrath as follows:

"Q. "Doctor, after the single x-ray was taken November 5th, what further treatment for her physical needs, if any, were given following the results of that x-ray?"

A. "The patient was placed in hyperextension." (T-144)

In addition to the hyperextension care a full-length body brace was made by the Chester Brace Company in Boise and fitted to the appellant. This brace was worn for some days, and the appellant was getting up out of bed with her brace on.

"Q. "She continued to complain of pain and difficulty with her neck?"

A. "In a few days after she first got up with her brace then she began to complain of the pain in the back of her head and upper portion of her neck again." (T-148)

Thereupon Dr. McGrath ordered more xray films taken of the cervical area which films were taken on November 18th. These films were read by the defendant, Dr. Bolker, on November 20, and the report is not only in evidence as an exhibit but is found at page 153 of the transcript, and the essential part is "It is believed that the odontoid process is intact

but flexation view of the neck and lateral projection will be retaken to verify this conclusion."

The doctor stated that this report meant to him that there was a possibility the condition was congenital in origin or traumatic but that additional films were requested and taken on November 20th and the films read again by Dr. Bolker. The report was received on November 26th, and the patient thereupon told to stay in bed. (T-155)

On November 25, 1952, the day before Dr. McGrath received the final readings on the xray film from Dr. Bolker he called Dr. Burton, an orthopedic surgeon at Boise, Idaho, and on the following day Dr. Burton came to Weiser and examined the patient and suggested a full body plaster cast, which was applied by Dr. Burton on November 30th. Dr. Burton left no instructions for special care except to try and keep the patient quiet. (T-166-167)

Under cross-examination by Mr. Donart the witness stated that when he first observed the patient in the xray room at the Weiser Memorial Hospital she was in a state of shock, having severe pain and he detected, "a very strong odor of alcohol on her breath." All of these matters had to be considered and taken into consideration in the taking of the xrays and that in the process of taking the xray "it was very painful to keep her on the xray table. In fact, it would even increase the amount of shock she was in, and that she was in such serious condition that any mistreatment or slightest error would

have meant her sudden death." (T-178-179)

This witness agreed with all the other medical witnesses that "in any serious injury the patient should be considered first before the injuries. The injuries are secondary. Many times in attempting to treat the injury you may cause the patient's death". (T-181)

It was the general practice in the vicinity of Weiser for the medical profession to rely upon and accept the interpretation of xrays as given by the radiologist. (T-181)

On the 4th and 5th hospital day a change developed in the condition of the patient.

"A. "Yes, she started with delirium tremens."

Q. "And what is delirium tremens?"

A. "Well, it is a state that is characterized by horrible dreams that usually come on a chronic alcoholic that has had several years of drinking, and frequently follows a severe accident, or a serious illness. They have both visual and auditory hallucinations. In other words, they hear voices and they see animals, bugs, snakes and things of that sort."

Q. "And what manifestation did she have beginning about that time?"

A. "Well, she was hearing voices and she was seeing bugs, chickens and animals."

Q. "Any peculiar colored chickens?"

A. "Green."

Q. "How long did that condition continue?"

A. "Well, four days that it was very acute and then there was another six or seven days of some mental confusion."

Q. "During that time was she practical, could you do anything with her?"

A. "No, she got up—well, she was never restrained. People have D. T.'s should never be restrained."

Q. "Was it during that time that the episode she mentioned about going through the window occured?"

A. "The first day."

Q. "Now why don't you restrain a person who has delirium tremens?"

A. "Well, if you restrain them they may die from exhaustion or in case of injury they increase the severity of their injury." (T-193-194)

And again:

"Q. "Before you started treatment of this woman other than the liquor you smelled on her breath, or at any time when these delirium tremens developed, had you been given any suggestion or indication from her that she had been drinking alcoholic liquor rather continuously?"

A. "No, sir."

Q. "When her condition got such that she thought she could safely be xrayed again did you take a second x-ray?"

A. "I had the x-ray of the dorsal spine which had been recommended by Doctor Morris at that

time." (T-195)

The doctor then testified with relation to the thoracic vertebra that eventually showed up as being wedge shaped, that if the blood supply is shut off from the crushing then it destroys the life of the bone, and that once cut off the damage is done and that it would make no difference whether addi tional xrays were taken or not because the absorption would take place no matter what was done. (T-197-199)

The doctor testified that the body cast which Dr. Burton placed on the patient had the identical effect of immobilization as the neck brace which he wanted to put on the patient the day she entered the hospital and the body brace that he had made for her on November 5th, the only thing being that Dr. Burton's body cast was in one piece but that the effect of the treatment—the purpose of the treatment was the same. (T-220)

On page 223 of the transcript Mr. Lazarus renewed his examination of this witness and made a searching inquiry through to page 234 of the transcript of the appellant's condition particularly in connection with the delirium tremens, and only impressed the fact that the appellant had suffered from the delirium tremens over this period of some two weeks.

Following the searching examination by Mr. Lazarus of the witness in relation to the delirium tre-

mens, he was then questioned especially about his agreement with the text writers, particularly with the text of Key & Conwell. The witness gave as his opinion that the texts were very fine where and when they could be applied (T-252), but that the text was for a normal situation and that they could only be followed where a situation was normal, which was not the case of the appellant. (T-259) When the appellant entered the hospital with the pain radiating through the left side of the chest and rib fractures were suspected, Dr. McGrath taped her by use of elastic bandages. These she also removed by her own accord, and had she cooperated with the doctor he would have left them on for a long period of time. (T-266).

The doctor further testified that he attempted to get from Mrs. Cox a history of the appellant's drinking, and was advised that she had always been a problem as a drinker.

"A. "Yes, at least that is the answer I got." (T-270)

After the delirium tremens were over, Dr. McGrath asked the appellant about her drinking and she told him that she had an occasional drink before dinner and one or two afterwards, but that he had never had a patient admit that they were excessive drinkers. (T-274)

Dr. Robert M. Coates was called by the appellant (T-284) and identified himself as a physician and

surgeon practicing his profession at Weiser, Idaho| The witness stated upon direct examination by Mr. Lazarus:

"Q. "Are you familiar with the usual standards of practice maintained in the hospital in Weiser in Washington County?"

A. "Yes, I think I can answer that." (T-286)

* * *

Q. "Doctor, is it the practice of the physicians, general practice at that hospital of the physicians to read their own x-ray films; if you know?"

A. "No, that is not the practice, sir."

Q. "What is the practice in that regard, Doctor?"

A. "It is to refer them to an x-ray specialist." (T-287)

And again:

"Q. "Now, Doctor, can you tell us whether or not under the general standards among the physicians practicing in Washington County, Idaho, whether it is considered that immobilization with respect to neck injuries of some character is necessary or desirable?"

A. "It would depend upon each case. You would have to evaluate each case, the individual, and the entire situation."

Q. "Can you tell us what the general practice would be, I know it would vary in each case, but can you tell us if there is a general practice in that regard?"

A. "In certain cases you would immobilize, and other cases you probably would not."

Q. "What type of case do you think you do not immobilize?"

A. "Would not?"

Q. "Yes."

A. "Well, of course one instance would be in which the patient refused immobilization, and another type of case would be if you felt the general condition of the patient was such that immobilization would produce further injury, you wouldn't." (T-293-294)

And again:

"Q. "Can you tell us this, Doctor, under the standards applicable in your county, can you tell us based upon the knowledge and skill of the physicians in that area, can you tell us what happens if you do have fractures of the cervical vertebrae and if for a period of time, say four weeks or five weeks, any period of time, if the fractures are not reduced or immobilized or treated; can you tell us whether ordinarily any damage results?"

A. "Not necessarily, no."

Q. "Now, Doctor, can you tell us as a result of your knowledge and skill, can you tell us what the ordinary accepted treatment in your county where a diagnosis is made of a compression fracture in the thoracic area, can you tell us how the patient is ordinarily treated?"

A. "Ordinarily you would put them in hyperextension." (T-295)

On cross-examination by Mr. Donart the witness testified with reference to the practice in his vicinity in regard to xray film:

"Q. "And having obtained the opinion of the radiologist, to support any views you might have, or that is the general practice for the general practitioner to subordinate his views as to what is shown by that x-ray to the views of the radiologist as shown by his report?"

A. "I accept the radiologist's opinion, yes."

Q. "And that is the general practice, is it not?"

A. "Yes, sir." (T-300)

The witness again stated (T-301) that obtaining additional xrays depended entirely upon the individual case. This witness further stressed under cross-examination that cooperation of the patient with his physician is essential and stated:

"Q. "So if a patient is uncooperative he can throw them (sand bags) off?"

A. "That is right."

Q. "The effective use of sand bags, like the effective use of ice packs, we will say, requires cooperation by the patient, doesn't it?"

A. "That is right."

Q. "Now I believe you stated in a case of neck injury immobilization is advisable?"

A. "In certain instances, yes, sir." (T-302)

And again:

"Q. "Let's take a case of a patient with a serious neck injury, the patient three times refuses

to allow her neck to be placed in a neck brace and where ice packs are put on she throws them off, and the patient then is uncooperative; isn't it a fact that it is just as likely to be harmful to that patient to try and force her into immobilization as it is to leave her alone?"

A. "That is right, sir." (T-303)

And the following:

"Q. "Now when you have a patient like this one, a patient we will say that is uncooperative, she is suffering severe pain; isn't it better just to leave her neck alone upon the assumption that that being painful she will immobilize herself; isn't that more in harmony with the general practice than to try to force immobilization on her?"

MR. LAZARUS: I am going to object to the portion of the question "a patient like this one."

BY MR. DONART:

"Q. "Her condition and anatomy in very severe pain and uncooperative?"

MR. LAZARUS: "It is the defendant's contention in this case she was uncooperative, and the plaintiff's contention she was cooperative."

THE COURT: "There is evidence here she was uncooperative."

MR. LAZARUS: "And evidence she was."

THE COURT: "You can examine on it."

(Last questions read by the reporter).

A. "Yes, that is right."

Q. "Isn't it consistent with a general practitioner of medicine that if a person has got a severe

injury of the neck, where it is painful to move that neck, the patient himself is not likely to move it?"

A. "Yes, sir, that is correct." (T-304-305)

In discussing the matter of placing a patient with a compressed thoracic vertebrae in hyperextension the cross-examination continued:

"Q. "Hyperextension can do good?"

A. "Yes, sir." (T-306)

And again:

"Q. "When a patient like this is brought into a hospital with injuries, which is the first thing you treat, the injury or the patient?"

A. "You treat the patient."

Q. "In other words, if there is something about the patient's condition aside from this injury that requires treatment, that is treated first, isn't that it, or first consideration?"

A. "Yes, that is right."

Q. "In other words, you go on the theory it is better to have a live patient with something of an injury than a dead patient?"

A. "That is correct." * * *

Q. "Doctor, in your experience would the fact that a patient was brought into the hospital in a state of shock, suffering from a severe injury, and was in severe pain for three or four days, and beginning the fourth day developed a case of delirium tremens, would that make a difference in

the treatment that would be accorded to the patient?"

(Objections and rulings)

A. "The answer is yes."

Q. "It isn't the general practice to attempt to put a patient suffering from delirium tremens either in hyperextension or in forced immobilization, is it?"

A. "No, it is not." (T-309-311)

After some re-direct examination cross-examination by Mr. Donart:

"Q. "Now, Doctor, if a person came in with serious injuries, before you started any particular treatment of those injuries you would ascertain whether the patient was in physical condition to withstand the treatment, wouldn't you?"

A. "Yes, sir."

Q. "There would be no percentage in correcting an injury if a patient couldn't stand the treatment, would there?"

A. "That is correct." * * *

Q. "It wouldn't have been the practice to attempt to put the patient on an x-ray table and take an x-ray if the patient was suffering from delirium tremens?"

A. "No, that is correct." (T-314)

Q. "There must be a pretty compelling reason for further x-rays before one is taken of the patient in that condition; isn't there?"

A. "In what condition?"

Q. "The condition this woman was in with the pain she was suffering?"

MR. LAZARUS: "—I take it—

THE COURT: "Yes, it is assuming facts that he hasn't stated."

MR. DONART: "I will add the necessary trimmings."

BY MR. DONART:

Q. "—At the time of the admission and afterwards with injury to her neck and injury to her sixth dorsal vertebrae, and having gone through a spell of delirium tremens; a patient in that condition would suffer considerable agony just being placed on an x-ray table for the taking of x-ray pictures; wouldn't she?"

MR. LAZARUS: "If you know, of course, Doctor?"

A. "By being placed on an x-ray table?"

Q. "Yes, and an x-ray taken?"

A. "Yes, that is correct." (T-314-315)

The defendant, Dr. Judson B. Morris, was next called by the appellant under Rule 43(B) (T-316) and questioned with reference to the taking and reading by him of xray films. On cross-examination by his own counsel (T-342) we find this testimony of Dr. Morris in speaking about the two xray films taken on October 19, 1952, of the cervical spine of the appellant:

Q. "I believe you said the reason that the film did not show the fracture was that it is in perfect

alignment; is that your testimony?"

A. "Yes."

Q. "Now I am asking you, would it have been proper to have turned or twisted that neck to try to get any other films with that condition existing?"

(Objections and rulings omitted.)

A. "If I suspected a serious neck injury or knew that there was likely to be one, we instruct our technicians definitely—

(Objections and rulings omitted)

A. "It would not be proper to turn the head for examining."

Q. "Explain what you think should have been done?"

A. "The head should not have been turned."***

Q. "Tell the jury when a patient, a patient comes in for that to you suffering from shock, whether it is good medical practice to take whole series of skull and cervical spine pictures, or whether it is good practice to leave them alone with as few as possible?"

(Objections and rulings omitted.)

A. "With as few as possible is the answer, that is the best practice."

Q. "Doctor, is it the practice to often take none at all?"

A. "Very frequently."

Q. "Where does the danger lie, in the fracture or in the cord, or tissue?"

A. "The most important thing is the soft tis-

sues such as the spinal cord in case of the spine, or brain in case of injuries around the skull." (T-344)

And again:

"Q. "Is a patient in shock a good subject or a good risk on the x-ray table?"

A. "No, sir, they are not. We never take x-rays of a patient in shock."

Q. "You never do?"

A. "No, sir."

Q. "In addition to that, if the patient had a strong odor of liquor on her breath would that add to any reason why more pictures should not be taken?"

(Objections and rulings omitted)

A. "If it is such as to be strong enough to make you suspect they were under the influence so they couldn't cooperate it would make a definite difference."

Q. "Doctor, now if the patient was not cooperative, does that make a difference in the number of pictures you take?"

A. "Certainly does." (T-347)

And again:

Q. "Wouldn't the factors now, Doctor, of shock and then at least getting to the point where there was a strong odor, and with the patient complaining of severe pain in the neck, would you take any pictures at all or in excess of two?"

A. "No, we wouldn't." (T-348)

And again:

Q. "Would it be proper practice of medicine to take or attempt to take x-ray films of either the cervical or dorsal spine on a patient suffering with delirium tremens?"

A. "Did you say would it be possible?"

Q. "Would it be good practice of medicine?"

A. "I would say not." (T-352)

Colette Marie Casslo, whose deposition was taken at San Francisco by the appellant on March 2, 1955, identified the hospital record as made at the Notre Dame Hospital and the xray pictures taken by the hospital of the appellant. There is no further comment needed on her testimony.

Dr. John Joyce Loutzenheiser was the next witness called by the appellant and testified by deposition taken at San Francisco on March 2, 1955. On direct examination the witness stated that he is an orthopedic surgeon practicing in the Bay area. He first saw the appellant at the Notre Dame Hospital in San Francisco on December 9, 1952. (T-361) She was encased in plaster from the back of her head and chin to the pelvic brim. (T-362)

The physical examination made by the witness and the xray films taken at the hospital showed a fracture through the odontoid process of the second cervical vertebrae and a severe compression of the sixth thoracic vertebrae. (T-364)

In the treatment of the appellant, Dr. Loutzen-

heiser removed the cast and then attempted to straighten the spine first by means of traction—traction upon the head. This was done by means of canvas and leather supports to the back of the head and chin rather than pins through the skull. Also attempt to gradually extend the thoracic spine in order to overcome the compression was not successful. (T-371)

In describing the traction on the head we find:

"A. "Yes, the head of the bed is raised to allow the body to act as a counter traction while you apply a given amount of weight over a pulley attached to the apparatus that I have previously described for a pull upon the skull so that a traction there is transmitted to the cervical spine in an effort to straighten it out and also to protect it." (T-372)

In further describing the treatment and the appellant, the witness stated:

"A. Well, she didn't tolerate any of this very well. This patient had had so much pain from the compression of the nerve roots at the level of the compressed sixth thoracic vertebra, the pain primarily coming around underneath the left scapula and extending out along the rib cage that we had to adjust all treatment to patient's comfort. This patient had not eaten well, was markedly under weight, badly undernourished. I would say at the end of this seven weeks of pain she was in poor physical condition. So we treated her as

a patient." * * * (T 373).

On further direct examination by Mr. Lazarus we find:

"Q. "Doctor, where you have a suspected fracture of the neck is early immobilization of that area important?"

A. "Well, that depends on the supervising surgeon's opinion. He may prefer to use—again to care for his patient. I don't know the situations that existed at the time of the injury and I couldn't comment on that. I have many times had to compromise with what was accepted procedure in order to save the life of my patient."

Q. "In other words if there were other conditions which require paramount consideration they should get it; is that correct?"

A. "That is correct."

Q. "Doctor, is early treatment important, however, in fractures of this type as far as their future is concerned?"

A. "Well, early treatment is always important treatment of the whole person. It is the treatment of the whole person, not any given spot that might be hurt." * * * (T-378-379)

On cross-examination by Mr. Roos (representing the defendant, Dr. Norman Bolker), the witness testified:

"Q. "I think you said in the course of your direct examination that there was little difficulty in diagnosing a fracture of T6 by x-ray?"

A. "That wasn't exactly what I stated, if you would like me to answer your question."

Q. "O. K.: was that your testimony?"

A. "Well; something preceded that statement. A compression fracture of this type would have very little difficulty as we saw it, there would be very little difficulty. You could have a fracture of T6 or any other vertebra that you would have difficulty possibly in diagnosing immediately, because it would maintain possibly its contour before collapse and then collapse. There was no evidence of any pathological circumstance in this patient which would allow—collapse of the vertebra other than injury, however."

Q. "Well, would you assume, Doctor, that the first x-rays taken shortly after the accident of the thoracic spine in Idaho—in connection with those x-rays would you assume that the radiologist reported that he was uncertain but that the possibility of a compression fracture of T6 should not or could not be ruled out. What action in your opinion would be called for by the attending surgeon after receiving such a radiologist's report?"

A."Oh, I couldn't answer that particularly. I mean, here you have a badly injured patient. That was obvious. She was in a great deal of pain. Ly ing on an x-ray table itself is a torture, and in my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; I would take care of my patient first and the x-rays in their proper time."

Q. "I suppose also that it would be entirely possible that angulation of the fracture or something had changed in between the time immediately after the accident and the seven weeks which it took her to arrive at Notre Dame; isn't that true?"

A. "The angulation of a fracture can change constantly during the time of care if you haven't the opportunity of completely protecting this patient because of other injuries, or other conditions, I mean. A patient may have a fractured vertebra which you have restored to perfect height collapse on you just lying in bed again, from the forces within the body during movement. Of course then, to give the conclusion to your answer then, the damage is done at the time of the injury but the degree of compression will be resultant of all the forces that occur as a result of this damage. They may not occur right at the start." (T-381-383)

On re-direct examination of the doctor by Mr. Lazarus the doctor was asked the following:

"Q. "Just one thing more, Doctor. What are the usual symptoms of serious neck injury or cervical fractures? What are the common symptoms?"

A. "Well, pain of course."

Q. "In the area involved, of course?"

A. "Not always. I mean unrecognized fractures of the spine are commonplace. A person

gets hurt in one place and the pain in that area might be influenced by the pain in another area and might go unrecognized in the location of the injury." (T-384)

Mrs. Sidney Cox was next called by the appellant (T-385) and identified herself as the twin sister of the appellant. At the time of the accident she was living in Bend, Oregon, and during the course of the stay of the appellant in the Weiser Memorial Hospital, this witness made three visits to her sister at Weiser. The first was on Thursday, October 23, 1952. She stayed only that one day. (T-388) The second was two days later (T-393) and the third was at Thanksgiving time. Throughout the testimony of the witness she described the pain which she observed the appellant suffering and her attempts to comfort the appellant. On direct examination the witness related that almost immediately after her return to Bend, Oregon, from her first visit, she was recalled to Weiser because of a change in the condition of her sister. In discussing this condition she testified:

"Q. "Did you notice any change in your sister's condition at that time?"

A. "Yes, sir."

Q. "What was it?"

A. "Well, to begin with, when we arrived and entered the bedroom my sister was, of course, so joyous and said, 'Sidney, you have some and come to help me,' and I knew from the expression in her

eyes she was speaking incoherently, and she said she was so glad I brought "Bonnie Hill". Of course, at that time my grandbaby that we had lost several months previously was who she was talking about, and by that comment I knew something was very strange."

Q. "She was talking then about one of your deceased children? That is deceased grandchild?"

A. "Yes, sir."

Q. "That she thought was with you at the time?"

A. "Yes, sir, that is right." * * * (T-394)

And again:

Q. "Any difference in her appearance?"

A. "Oh, her whole appearance was different. The expression of her eyes, her way of conversation, wasn't reasonable talk to me."

Q. "In addition to the talk being unreasonable, did you notice any difference except the expression on her face?"

A. "And the tape on her hand."

Q. "Anything different about her eyes?"

A. "The pupils were greatly dilated, and her eyes were more or less shiny or glassy."

Q. "Did she at that time tell you of any incident that had happened while you were gone?"

A. "Yes, sir. My sister said she had broken a window and stepped into it."

Q. "You don't recall any other symptoms that your sister had at that time?"

A. "Yes, sir. She kept staring at the floor, and

assuming there was something down there, and then seemed to have a fear something was trying to hurt her on the outside of the window, and she would keep looking and she said, "Sidney, what is that out there, they have to hurt me." (T-394-395.)

The witness related that the following morning she talked to the appellee, Dr. McGrath, and explained her worry over her sister's condition and the possibility of her neck being broken. The doctor advised her that the xray films didn't reveal a fracture; but in connection with his concern of the sister, he asked Mrs. Cox, "Has your sister ever been a heavy drinker?" to which the witness replied, "No, Dr. McGrath." (T-396)

Under further examination by appellant's counsel in connection with the drinking by the appellant the witness stated, "Yes, my sister will take a drink but never over-drinking." (T-406)

The last witness called by the appellant was Gardner F. Wood, the twenty-four year old son of the appellant, and his testimony was merely cumulative to that already in the record and no further comment will be made on it.

At the conclusion of this testimony the defendants, and each of them, separately and individually, moved the Court to dismiss the action upon the ground and for the reason that upon the facts and the law the appellant had shown no right to relief

and then specified the grounds and reasons in detail. (T-450-453)

As to the defendant Dr. Morris, Mr. Lazarus stated, "We do not resist the motion". (T-453). The motion was thereafter granted as to the defendant Dr. McGrath, from which order of dismissal the appellant had sought this review.

ARGUMENT

A. THE STANDARDS OF PRACTICE BY WHICH THE MEDICAL PROFESSION IS JUDGED IS UNIVERSALLY KNOWN AND RECOGNIZED. THEY ARE:

(1) Individuals licensed to practice medicine are presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment;

(2) The contract which the law implies from the employment of a physician or surgeon, is that the doctor will treat his patient with that diligence and skill above mentioned;

(3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession;

(4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of the medical practice prohibits in such cases, or, he must have neglected to do something required by those standards;

(5) In order to sustain a judgment against a physician or surgeon, the standard of the medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard;

(6) It is not required that physicians and surgeons guarantee results, nor that the results be what is desired;

(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by appellee, or a disagreement of doctors of equal skill and learning as to what the treatment should have been does not estalish negligence. In such cases the courts must hold that there is nothing upon which the jury may pass, the reason being, the jury may not be allowed to accept one theory to the exclusion of the other; and

(8) Negligence on the part of a physician or surgeon by reason of his departure from

the popular standard of practice, must be established by medical testimony. The evidence, from the very nature of the case, must come from men learned in the profession, because other witnesses are not competent to give it.

Fritz v. Horsfall
163 Pac. (2) (Wash) 148
Willis v. Western Hosp. Assn.
182 Pac. (2) 950 (Ida)
Swanson v. Wasson
292 Pac. 197 (Ida)
Evans v. Bannock County
83 Pac. (2) 427 (Ida)

B. NEGLIGENCE, LACK OF SKILL, NEGLIGENCE IN APPLYING SKILL, OR ANY OTHER ACT ON THE PART OF A PHYSICIAN AND SURGEON FALLING WITHIN THE BROAD TERM OF MALPRACTICE, CAN ONLY BE PROVEN BY MEDICAL EXPERTS.

Willis v. Western Hosp. Assn.
67 Ida. 435; 182 Pac. (2) 950
Trindle v. Wheeler
143 Pac. (2) (Cal.) 932
Church v. Block
182 Pac. (2) (Cal.) 241
Engelking v. Carlson
88 Pac. (2) (Cal.) 695
Seneris v. Haas

281 Pac. (2) (Cal.) 278

Ayers v. Perry

192 Fed. (2) 3rd Cir. Ct. of Appeals, 181

Mitchell v. Saunders

13 S. E. (2) 242

141 A. L. R. 6

Lashley v. Korerber

150 Pac. 272 (Cal.)

7 *Wigmore on Evidence*

3rd Ed. 453, para. 2090.

"The overwhelming weight of authority supports the view that ordinarily at least, expert testimony is essential to support an action for malpractice against a physicial or surgeon."

141 A. L. R. 6

In the case of *Ayers v. Parry*, 192 Federal (2d) 181 at 184 we find:

"The lack of due care, or lack of diligence on the part of a physician in diagnosis, method and manner of treatment ordinarily must be established by expert testimony. . . ."

Continuing further on the same page:

"Occasionally expert testimony is not required where an injury results to a part of the anatomy not being treated or operated upon and is of such character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves. This situation arises

when an ulterior act or omission occurs, the explanation of which does not require scientific opinion."

In the case of *Engleking v. Carlson*, 88 Pacific (2d) 695 at 697 we find:

"Whether he has done so in a particular case is a question for experts and can be established only by their testimony. *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642; *Patterson v. Marcus*, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. *William Simpson C. Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 240 P. 58; *Johnson v. Clarke*, 98 Cal. App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. *Donahoo v. Lovas*, 105 Cal. App. 705, 288 P. 698."

In the case of *Trindle v. Wheeler*, 143 Pacific (2d) 932 at 933:

"The law requires that the physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that

learning and skill to the treatment of his patient. Whether he has done so in a particular case is generally a question for experts and can be established only by their testimony unless the matter in issue is within the common knowledge of laymen."

"When the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert testimony is conclusive."

Lashley v. Korerber
150 Pac. (Cal.) 272.

"It happens, however, that in one class of cases, viz: actions against a physician or surgeon for malpractive, the main issue of the defendants use of suitable professional skill may be a topic calling for expert testimony only; and also that the plaintiff in such an action often prefers to rest his case upon the mere fact of his sufferings, and to rely upon the jury's untutored sympathies, without attempting specifically to evidence the defendants' unskillfulness as the cause of these sufferings.* * That expert testimony must appear somewhere in the plaintiffs' whole evidence; and for lack of it, the court may rule, in its general power to pass upon the sufficiency of the evidence that there is not sufficient evidence to go to the jury."

7 *Wigmore on Evidence*
3d Ed. 453, para. 2090.

The Supreme Court of Idaho in *Swanson v. Wasson*, 292 Pac. 147, said:

> "Where the evidence is as consistent with the absence, as with the existence, of negligence, the case should not be left with the jury. As was said in *Ewing v. Goode*, 78 Fed. 442, 443:
>
> 'If there is no injury caused by lack of skill or care, then there is no breach of the physician's obligation, and there can be no recovery. *Craig v. Chambers*, 17 Ohio St. 253, 260. Mere lack of skill or negligence, not causing injury, gives no right of action, and no right to recover even nominal damages . . . . .
>
> Before the plaintiff can recover, she must show by affirmative evidence—first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury."

In the recent malpractice case of *Willis v. Western Hospital Assn.*, 182 Pac (2) 950, the Supreme Court of Idaho, not only quoted with approval the case of *Swanson v. Wasson*, supra, but added:

> "The burden of proof was on appellants and it is not sufficient to merely show a possibility or raise a suspicion that respondents may have been negligent."

In the case of *Ayers v. Perry*, 192 Fed. (2) 181 (3d CCA) at page 185, the court in discussing an action against a doctor said:

> "We think it is beyond dispute that the nerve roots which were damaged in the process of producing anesthesia by injecting the drug into the spinal cord are within the region of treatment and that the cause of this injury to the nerve roots and its effects on the legs and adjacent organs, must be explained by experts. When the expert testimony offered by the plaintiff ascribes the cause to the toxic quality of the injected drug as distinguished from negligence of the anesthetist that evidence is binding upon the court and the jury would not be permitted to speculate to the contrary."

What now of the medical testimony offered by the appellant which she claims is sufficient to take this case to the jury? There are certain basic facts in this case some of which are admitted by the appellant and some of which, while not admitted, are not denied:

1. The appellant received a number of very serious injuries in an automobile accident on October 19, 1952, near Weiser, Idaho;

2. She was taken to the Weiser Memorial Hospital suffering excruciating pain, she was in shock;

3. There was a strong odor of liquor upon her breath;

4. Her general physical condition would not tolerate more than the utter minimum of handling;

5. The utter minimum of xray films was indicated due to her physical condition;

6. On the fourth or fifth hospital day, the appellant developed delirium tremens, referred to by appellant as delirium-shock-hallucinations.

7. Appellant's physical and mental condition did not permit a return to x-ray before November 5th.

The appellant called Dr. Robert M. Coates, a physician and surgeon in general practice at Weiser, Idaho since 1930, except the time he spent in the military service. This witness was questioned at length by the appellant and we make this flat assertion, Dr. Coates not only found nothing wrong with appellee's conduct as a physician and surgeon in the care and treatment of the appellant, but placed his stamp of approval upon it.

All of the physicians practicing in Weiser referred the X-ray films to a radiologist and relied upon the radiologist's report. (T-287). This, as we will later point out, is exactly what Dr. McGrath did. Further, Dr. Coates stated that each case must be treated separately. A doctor must evaluate the entire situation of a patient and treat it as such and that no rule of the thumb, so to speak, could be laid down in the care of fractures. (T-292-293).

When a diagnosis is made of a compression fracture in the thoracic area ordinarily the proper treat-

ment would be to place the patient in hyperextension. (T-295). Again we say, this is exactly what Dr. McGrath did.

If a patient is uncooperative, any forced treatment is apt to be more harmful to the patient than if the patient was left alone. (T-303). This again is exactly the situation that Dr. McGrath faced.

Questioned about the treatment of the injuries of the patient—that is, which has preference, the treatment of the injuries or the care of the patient, Dr. Coates reiterated time and again, the patient must be considered first. (T-310). Dr. Coates further testified on behalf of the appellant, that under no circumstances should the patient be placed on an X-ray table when suffering with delirium tremens. (T-314).

While we have not attempted to cover the entire testimony of Dr. Coates, we have referred, we believe, to sufficient of it to demonstrate that at no time did Dr. Coates even intimate that Dr. McGrath did not follow the accepted practice in the vicinity. In this connection, we call this Honorable Court's attention to the fact that the appellant has in her brief, we feel, studiously avoided any reference or citation to the medical testimony introduced by her.

The appellant called Dr. Judson B. Morris, first under Rule 43 (B) (T-316) and then followed by making the doctor her own witness. (T-328-332). Dr. Morris, it is of course also recalled, was a de-

fendant in this case. As a radiologist he examined the first two films taken of the cervical spine of the appellant and his report on those was that there was "no evidence of fracture, luxation or subluxation". (T-131-132). Dr. Morris stated that where there was a serious neck injury suspected, the fewer X-ray films taken, the better, and that it is very frequently the practice to take none at all. (T-344-345).

He further stated that where a patient is in shock, he never takes X-rays, (T-349) and that it would not have been good practice of medicine to have attempted to take X-ray pictures of a patient suffering from delirium tremens. Again, we suggest to this Honorable Court, that Dr. Morris finds no criticism whatsoever of the treatment afforded by Dr. McGrath. Certainly the most that can be said is that initially Dr. McGrath had two films of the cervical spine taken, whereas Dr. Morris questions if he would have taken any under the circumstances; however, the appellant's complaints against Dr. McGrath are not that the doctor took these two X-ray films, but rather that he did not take enough or often enough. Certainly the appellant can get neither comfort from nor cite any testimony of Dr. Morris to bear out this contention.

It will be recalled the appellant left the Weiser Memorial Hospital and arrived in Notre Dame Hospital in San Francisco on the morning of December 9th, and was placed under the service of Dr. John Joyce Loutzenheiser, an eminent orthopedic surgeon

in San Francisco. Dr. Loutzenheiser was called to testify in this case and did so by way of deposition taken in San Francisco on March 2, 1955.

Let us look at the record to see if this eminent surgeon had any criticism of the treatment offered and afforded by this country doctor of Weiser to the appellant. After a physical examination and X-ray film by Dr. Loutzenheiser, he placed the appellant's cervical spine in traction. (T-371). This is identically what Dr. McGrath wanted to do with appellant on the first and second days she was in the Weiser Memorial Hospital, but, did the appellant accept the treatment suggested by Dr. McGrath? The answer is found both by the appellant (T-47, "He didn't get it on me, let's put it that way" (T-87) and the testimony of Dr. McGrath, "She swore and said "I won't wear that thing'." (T-127) The next treatment by Dr. Loutzenheiser was a back body cast, identically what Dr. McGrath did when he had the back body cast made by the Chester Brace Company of Boise, Idaho. Certainly then, as to those matters, this country doctor was trying to use the same treatment as was afforded by this eminent surgeon, Dr. Loutzenheiser.

We beg to quote again from the deposition of Dr. Loutzenheiser:

"By Mr. Lazarus:

Q. Doctor, where you have a suspected fracture of the neck, is early immobilization of the area important?

A. Well, that depends on the supervising surgeon's opinion. He may prefer to use—again to care for his patient. I don't know the situation that existed at the time of the injury and I couldn't comment on that. I have many times had to compromise with what was accepted procedure in order to save the life of my patient.

Q. In other words if there were other conditions which required paramount consideration they should get it; is that correct?

A. That is correct.

Q. Doctor, is early treatment important, however, in fractures of this type as far as their future is concerned?

A. Well, early treatment is always important —treatment of the whole person. It is the treatment of the whole person, not any given spot that might be hurt. Nobody can be-little the necessity for the highest type of care in severe injury. So earlier treatment of course is important." (T-378-379)

Again, we make the observation, wherein does Dr. Loutzenheiser condemn this country doctor? Dr. Loutzenheiser states: "I don't know the situation that existed at the time of the injury and I couldn't comment on that". "Well, that depends on the supervising surgeon". In other words, Dr. Loutzenheiser said in effect, "I was not there and it is for the supervising surgeon to exercise his judgment". (meaning Dr. McGrath). He specifically

gives approval at a later place in his testimony. (T-381-382).

What was the situation that faced Dr. McGrath? He had a patient who for a week had been out on a vacation and celebration in the little town of Council, Idaho, drinking an unverified amount of whiskey.

> "When you are supposed to be enjoying yourself, you don't count them". (T-93)

At any rate, when the appellant was placed upon the xray table in the Weiser Memorial Hospital, sometime around ten thirty or eleven o'clock on Sunday, October 19th, she was obviously suffering severe injuries. She was in shock and there was a strong odor of alcohol liquor on her breath, and four or five days thereafter she developed delirium tremens, which lasted severely for four days and then continued to a less degree for six or seven days. Dr. Loutzenheiser knew exactly what he was talking about when he said "I have many times had to compromise with what was accepted procedure in order to save the life of my patient". (T-378-379) No wonder he told the court that the attending surgeon was the one who had to exercise the judgment. But, did the appellant's physician stop with the above observation? When asked on cross-examination with reference to the taking of additional xray films he not only confirmed the care as afforded by Dr. McGrath, but confirmed Dr. Morris, another of appellant's physician witnesses.

This is his testimony.

"Q. I think you said in the course of your direct examination that there was little difficulty in diagnosing a fracture of T6 by x-ray?"

"A. That wasn't exactly what I stated, if you would like me to answer your question."

"Q. O.K.; was that your testimony?"

"A. Well; something preceded that statement. A compression fracture of this type would have very little difficulty as we saw it, there would be very little difficulty. You could have a fracture of T6 or any other vertebra that you would have difficulty possibly in diagnosing immediately, because it would maintain possibly its contour before collapse and then collapse. There was no evidence of any pathological circumstance in this patient which would allow—collapse of the vertebra other than injury, however."

"Q. Well, would you assume, Doctor, that the first x-rays taken shortly after the accident of the thoracic spine in Idaho—in connection with those x-rays would you assume that the radiologist reported that he was uncertain but that the possibility of a compression fracture of T6 should not or could not be ruled out. What action in your opinion would be called for by the attending surgeon after receiving such a radiologist's report?"

"A. Oh, I couldn't answer that particularly. I mean, here you have a badly injured patient. That was obvious. She was in a great deal of pain. Lying on an x-ray table itself is a torture, and in

my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; I would take care of my patient first and the x-rays in their proper time." (T-381-382).

Note, if the court please, the statement of Dr. Loutzenheiser in regard to placing this patient back on the x-ray table. "Lying on an x-ray table itself is a torture, and in my own personal opinion, I might not subject my patient to an immediate survey on the basis of such a report; *I would take care of my patient first and the x-rays in their proper time.*" (emphasis ours)

Where, we ask the appellant, does Dr. Loutzenheiser, either condemn or disapprove of the treatment afforded by Dr. McGrath?

The appellant called the appellee, Dr. M. S. McGrath, as a witness at the trial of this cause under Rule 43 (B). In our statement of the case, we have brought to the court's attention at least some of the salient parts of his testimony. His testimony covers from pages 111 to 283 of the record, and for two days he under went a most searching examination. Page 14 of the appellant's brief is devoted to the testimony of Dr. McGrath and an obvious attempt is made to pick out isolated statements to justify the position of the appellant that there was evidence sufficient to carry her case to the jury. What counsel did not say or point out, is far more significant than the few little sketchy observations that are

pointed out. Counsel states "that he did nothing to immobilize her injured neck after suggesting that she wear a neck brace". (R-134), but what counsel did not say was that three times Dr. McGrath tried to persuade appellant to let him put a neck brace on her and that she swore at him and said "I won't wear that thing." What counsel did not point out was that he had ice-packs placed on each side of the neck and tried to have them kept there, but the appellant would not tolerate that and would throw them out on the floor. What counsel did not point out was that as soon as the appellant had recovered sufficiently from the delirium tremens to be placed upon the x-ray table, this was done and as soon as the radiologist's report revealed a compression fracture of T6, the patient was placed in hyperextension and a body brace made for her. This is exactly in harmony with what Dr. Coates said was proper in the vicinity and exactly what Dr. Loutzenheiser did in San Francisco. What counsel did not point out was that as soon as the fracture of the odontoid process was demonstrated by the x-ray, Dr. McGrath called an orthopedic surgeon Dr. Burton from Boise and that some four or five days after Dr. Burton examined the patient, he, Dr. Burton, placed her in the plaster cast, immobilizing the head and neck.

What counsel did not point out was that Dr. McGrath had not only a seriously injured patient, but an uncooperative one. What counsel did not point out was that every medical expert which he called

and questioned, testified that a doctor first treats the patient, and the injuries in their due time. What counsel did not point out was, to take the answer from Dr. Loutzenheiser, that the damage to the thoracic vertebra is done at the time of the injury and that it can collapse while the patient is just lying in bed. What counsel did not point out, to refer back to Dr. Coates, is that in the treatment of an injured person, "it is better to have a live patient with something of an injury, than a dead patient."

Those, Your Honors, are only a few of the things that counsel for appellant did not point out, but to return to the things he did point out, there is not one word of medical testimony in this entire record that Dr. McGrath did either some act which good medical practice required he should not have done, or that he failed to do some act that good medical practice required that he should do.

Going one step further, complaint is made by appellant of some stiffness of her neck, but she has a union of the odonoid process with a perfect alignment. She has some stiffness, but it is strange and singular that there is not one word of testimony from anyone, medical expert or otherwise, who claim or assert that the stiffness is not the natural result of the injuries.

C. THE LAW HAS NEVER HELD A PHYSICIAN OR SURGEON LIABLE FOR EVERY UNTOWARD RESULT WHICH MAY OCCUR IN MEDICAL PRACTICE,

BUT DEMANDS ONLY THAT A PHYSICIAN OR SURGEON HAVE THE DEGREE OF LEARNING AND SKILL ORDINARILY POSSESSED BY PRACTITIONERS OF THE MEDICAL PROFESSION IN THE SAME LOCALILTY, AND THAT HE EXERCISE CARE IN APPLYING SUCH LEARNING AND SKILL TO THE TREATMENT OF HIS PATIENTS.

McAlinden v. St. Maries Hosp. Assn.
156 Pac. 115 (Ida)
Willis v. Western Hosp. Assn.
182 Pac. (2) 950 (Ida)
Seneris v. Haas
281 Pac. (2) (Cal) 278
Huffman v. Lindquist
234 Pac. (2) (Cal.) 34
29 A. L. R. (3d) 485
Engelking v. Carlson
88 Pac. (2) (Cal.) 695
Fritz v. Horsfall
163 Pac. (2) (Wash) 148
Trindle v. Wheeler
143 Pac. (2) (Cal.) 932
Church v. Block
182 Pac. (2) (Cal.) 241
Ayers v. Perry
192 Fed. (2) 3d CCA 181
Mitchell v. Saunders
13 S. E. (2) 242

141 A. L. R. 6
Lashley v. Korerber
150 Pac. 272 (Cal.)
7 Wigmore on Evidence
3d Ed. 453, para. 2090
Swanson v. Wasson
292 Pac. 197 (Ida)
Evans v. Bannock County
83 Pac. (2) 427 (Ida)
Norden v. Hartman
285 Pac. (2) 977

In the California case of *Engelking v. Carlson*, 88 Pac. (2) 695, the court among other things, said:

"The law has never held the physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. * * * Whether he has done so in a particular case is a question for experts and can be established only by their testimony. * * * And when the matter at issue is one within the knowledge of experts only and is not within the knowledge of laymen, the expert evidence is conclusive. * * * Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved."

and ending its opinion the Court said:

"Medical evidence is required to show not only what occurred but how and why it occurred. That evidence established beyond question not only that the paroneal nerve may be injured even where due care is used but that this unfortunate result invariably occurs in a limited number of cases. The doctrine of res ipsa loquitur is, therefore, entirely inapplicable."

D. THE DOCTRINE OF RES IPSA LOQUITUR IS ONLY APPLIED IN MALPRACTICE CASES IN THOSE RARE INSTANCES IN WHICH A LAYMAN IS ABLE TO SAY AS A MATTER OF COMMON KNOWLEDGE AND OBSERVATION, THAT THE CONSEQUENCE OF PROFESSIONAL TREATMENT WERE NOT SUCH AS ORDINARILY WOULD HAVE FOLLOWED IF DUE CARE HAD BEEN EXERCISED.

Typical examples wherein the doctrine has application, are those wherein a sponge is left in the body; wherein the patient was burned with hot compresses; wherein the patient was burned through the operation of xray machines; wherein a hypodermic needle was lost in the body; wherein no xray at all was taken in the treatment of fractures; wherein the injury complained of bears no relation and could not be a consequence of necessary medical or surgical treatment, an instance where a patient is operated on for some abdominal disorder and re-

covers from the anesthetic with a fracture of some part of the anatomy not connected with the field of operation:

Reinhold v. Spencer
26 Pac. (2) 796 (Ida)
Engelking v. Carlson
88 Pac. (2) (Cal.) 695
Seneris v. Haas
281 Pac. (2) (Cal.) 278
141 A. L. R. 12
Moore v. Steen
283 Pac. (Cal.) 833
Batham v. Widing
291 Pac. (Cal.) 173
Ales v. Ryan
64 Pac. (2) (Cal.) 409
Ybarra v. Spangard
154 Pac. (2) 687
162 A. L. R. 1267

"There appears to be little question that the doctrine of res ipsa loquitur is inapplicable in malpractice actions when its invocation is sought solely upon the fact that the treatment was unsuccessful or terminated with poor or unfortunate results, and this conclusion is but in accord with, or resulting from, the universally recognized propositions that the mere fact of a poor or unsuccessful result does not raise a presumption of negligence, does not establish a prima facie case, and does not shift to the defendant the necessity

of carrying the burden of proof or going forward with the evidence."

162 A. L. R. 1267

"In cases where the physicians or surgeons lack of skill or of care is so gross as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required."

141 A. L. R. 12.

Again calling the court's attention to *Engelking v. Carlson*, supra, the California court in speaking of the doctrine said:

"If this were the rule as a practical proposition, no surgeon could ever operate without being an insurer of a medically satisfactory result. * * Probably in every operation there is some hazard which the medical profession recognizes and guards against but which is not always overcome. To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden on the medical profession which the law has not hitherto laid upon it. Moreover, such a rule is not justified by either reason or authority."

While the appellant's brief does not contain any legal proposition to the effect that he invoked the doctrine of res ipsa loquitur, the argument and the entire brief indicates an attempt to do so. Such an attempt is of necessity inspired by desperation on the part of the appellant, for, unless the doctrine

does apply, appellant's counsel must realize that his case has fallen. We will not indulge in any extended argument on this proposition. We rest with the firm conviction that the law in that respect is stated in our proposition number "B" and that the authorities cited in support thereof clearly demonstrate that the doctrine of res ipsa loquitur is not applicable in this case.

It therefore follows of necessity that the only part the testimony of the appellant and the other lay witnesses play in this case is to bring forth such facts upon which expert testimony could be based.

E. THE DOCTRINE OF RES IPSA LIQUITOR HAS NO APPLICATION WHERE ALL THE FACTS AND CIRCUMSTANCES APPEAR IN EVIDENCE.

"The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference and the necessity for the doctrine does not exist. Being a rule of necessity, it must be invoked only where evidence is absent and not readily available, and certainly not when it is actually presented. Nor has it any application where the cause of the accident is known and is not in question. Circumstances in addition to the bare physical cause of injury, attending an accident, sometimes supply the necessary circumstantial affirmative evidence to carry the case to the jury upon

the question of the defendant's negligence, and obviate the necessity of invoking the distinctive rule of res ipsa loquitur. Also, the circumstances may negative the inference of negligence or disclose that due care was used. It has been said that where there is the slightest evidence to explain the happening of the occurrence upon any theory other than that of the negligence claimed, the jury should disregard the inference arising from the fact of injury. * * * or does it apply where an unexplained accident may be attributable to one of several causes, for some of which the defendant is not responsible. It should not be allowed to apply where, on proof of the occurrence, without more, the matter still rests on conjecture alone or the accident is just as reasonably attributable to other causes as to negligence. In other words, if the facts and circumstances of the occurrence give rise to conflicting inferences, one leading to the conclusion of due care and the other to the conclusion of negligence, the doctrine does not apply."

38 Am. Jur. p. 997, Sec. 303.

APPELLANT'S OPENING BRIEF

Appellant's complete failure to set forth the facts of this case in the opening brief necessitated a far longer brief on the part of the appellee than is ordinarily required.

We have no quarrel whatsoever with the rule alluded to in Point "A" of appellant's argument that

the trial court on a motion to dismiss should consider the evidence in the light most favorable to the plaintiff. Under the argument, pages 11 to 19, the appellant has not pointed to one scintilla of medical testimony to support his contention that he should not have been non-suited, that is, under the Federal practice that the court should not have dismissed his cause. We have fully answered appellant's proposition "A" by our proposition "B".

Appellant's Point "B", page 19, of the brief contains nothing but Hornbook law, with which no one has any quarrel. The entire and complete answer is that the appellant failed to produce any evidence whatsoever to show that Dr. McGrath was either negligent in his treatment or that he was unskillful or negligent in applying his skill. Quite to the contrary, the appellant by the evidence of her witness Dr. Coates brought out very forcibly that the appellee, Dr. McGrath, followed the recognized practice of medicine in the vicinity of Weiser in the care of the appellant.

Likewise, appellant by her attending surgeon, Dr. Loutzenheiser, confirmed the treatment of Dr. McGrath, even to the point that it is often necessary to "compromise with what was accepted procedure in order to save the life of my patient."

Point "C" of appellant's brief deals with the requirement of the use of xray films in diagnosing. Again the cited cases reveal nothing but abstract principles of law. Every doctor called by appellant

as a witness supported the actions and treatment of Dr. McGrath and not one physician testified that a different course should have been followed. In fact, it is recalled the eminent Dr. Loutzenheiser, said repeatedly 'treat the patient as a whole—the xrays in their time.'

On page 30 of appellant's brief a point is made of the question of damages; the statement starts "Where malpractice is alleged and *proved* * * *" that in our view is as far as we need go with the proposition. We do not understand the courts will concern themselves with moot questions. Until a party *proves* malpractice the rest is entirely immaterial and beside the point. There would be no purpose in offering evidence of out-of-the-pocket expense or damages if that was all there was to offer.

CONCLUSION

We whole-heartedly agree that the right of trial by jury is a fundamental feature of our Federal jurisdiction protected by the Seventh Amendment of the Constitution and we would be the last to contend otherwise. We are sure that counsel for the appellant in this case has heard before "Please Mr. Lazarus, 'pin-point' the evidence which you contend is sufficient to take this case to the jury." We again request of our good friend that if there is any testimony in this case justifying the submission of the case to the jury, that he "pin-point" it, not only for us, but for this court.

As stated in 7 *Wigmore on Evidence*, supra:

"* * * the plaintiff in such an action often prefers to rest his case upon the mere fact of his sufferings, and to rely upon the jury's untutored sympathies without attempting specifically to evidence the defendants' unskillfulness as the cause of these sufferings. * * *"

DATED: Boise, Idaho, November 30, 1955.

Respectfully submitted,

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No. 14,804

IN THE

United States Court of Appeals

For the Ninth Circuit

PEGGY RAY WALKER KINGSTON,
Appellant,

vs.

M. S. McGRATH,
Appellee.

APPELLANT'S REPLY BRIEF.

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Subject Index

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No. 14,804

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M. S. McGRATH,
Appellee.

APPELLANT'S REPLY BRIEF.

OPENING STATEMENT.

This case is treated and discussed in appellee's brief as if there had already been a determination of the controversy in question after a trial on the merits which would have entitled him to all of the favorable inferences concerning conflicts and contradictions in the evidence under the ordinary rules on appeal. Thus, after rejecting appellant's statement of the case on the asserted ground that it is "incomplete and inadequate", appellee presents his version of the evidence. This is largely in the form of excerpts taken at random from the testimony, interpolated with appellee's comments as to their supposed significance. The transcript has been carefully sifted by appellee in the process, and there are very few references to any-

thing in the record tending to support appellant's contentions on this appeal. Much of the testimony actually presented in this myopic view of the evidence is, in fact, twisted and distorted with the same reckless disregard for accuracy shown by appellee at the trial of the case.

This is a closing brief, however, and we deem it unnecessary by way of rejoinder to categorically single out all of the many instances in which the evidence has been camouflaged and embroidered upon in appellee's brief. Specific reference to the numerous inaccuracies appearing therein will therefore be made here only where necessary to avoid confusion and misunderstanding. We are confident that in the final analysis, when the evidence is fairly considered and tested in accordance with the proper rules on appeal in a case of this kind, it will plainly appear that appellee's arguments are no stronger than the collapsible foundation of false assumptions upon which they necessarily rest.

ARGUMENT.

A.

APPELLEE'S BRIEF IGNORES THE RULE ON APPEAL FROM AN INVOLUNTARY DISMISSAL OR NONSUIT AT THE CONCLUSION OF PLAINTIFF'S CASE IN A TRIAL BY JURY THAT THE EVIDENCE IS TO BE TAKEN IN A SENSE MOST FAVORABLE TO APPELLANT.

In summarizing the testimony upon which appellant relies in our main brief, we referred first to the interpretation given by the authorities, including the

highest Court of the land, to Rule 41(b), Federal Rules of Civil Procedure, when invoked by a defendant on a motion to dismiss at the conclusion of plaintiff's case in a trial by jury. We carefully pointed out that the evidence, contrary to the usual rules on appeal, is to be regarded only in the light most favorable to plaintiff, and that the motion can therefore be properly granted only if the evidence, thus construed, is insufficient *as a matter of law* to justify a verdict for the plaintiff (Appellant's Opening Br. pp. 11-12).

The Federal rule is no different in this respect from the rule invariably followed by state tribunals to preserve the right to trial by jury on a motion for nonsuit. The effect of the motion has been well put by the Idaho Court as follows:

> "On a motion by the defendant for nonsuit after the plaintiff has introduced his evidence and rested his case, *the defendant must be deemed to have admitted all of the facts of which there is any evidence and all the facts which the evidence tends to prove.*" (Emphasis added).
>
> *Evans v. Bannock County* (1938), 59 Idaho 442, 449; 83 P. 2d 427.

A motion for nonsuit may properly be granted, therefore, only when disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiffs. The trial Court is not justified in taking the case from the

jury unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing Court would be impelled to reverse it on appeal or the trial Court to set it aside as a matter of law.

As we clearly stated in our former brief, "for purposes of this review, conflicts must therefore be ignored, and the evidence, with all reasonable inferences resulting therefrom, must be regarded in a light most favorable to appellant's contentions." (Appellant's Opening Br. p. 12).

There were obviously many irreconcilable conflicts in the testimony adduced in this case. This was true even as to individual witnesses, notably, the appellee, Dr. McGrath, who, as we shall point out, gave testimony by way of deposition which was often incompatible with his recollection as to the same events on the witness stand.

With the above rule in mind, however, we purposely made no attempt in our former brief to relate evidence merely contradictory to the facts established by plaintiff's proof in support of her legal theories, and which, if accepted by the jury, would have entitled her to a recovery. We were entitled to disregard such evidence and to assume that any conflicts would be resolved in appellant's favor.

The selection from the transcript presented by appellee as a purported statement of the facts consists, on the other hand, largely of testimony favorable to

appellee and disputed by other evidence in the case which has been carefully ignored. It has been largely made, as will be shown elsewhere with little difficulty, from testimony developed by appellee's counsel which was either intended to refute facts previously established by plaintiff's witnesses, or for the purpose of laying the foundation for anticipated defenses. Much of this evidence, if given effect and allowed to prevail, would have undoubtedly tended to defeat plaintiff. It is not entitled to consideration for purposes of this appeal, however, and appellee has most certainly started with the wrong approach. In short, appellee, in attempting to usurp for his own benefit the favorable view of the evidence to which the appellant alone is entitled, has endeavored to give a reverse application to the rules by which the appeal is governed. This, although paradoxically, after abusing and completely disregarding the correct rule for sixty pages, appellee, by a token reference to the rule in the course of the concluding paragraphs in his brief, finally recognizes that it exists and acknowledges that it has been accurately stated in appellant's brief. (Appellee's Br. pp. 60-61).

There is another very fundamental misconception in appellee's brief concerning the probative effect of the testimony in this case that should be considered here. A very substantial part of the testimony singled out and quoted by appellee was testimony elicited by appellee's counsel during the examination of appellee and other defendants called as witnesses under Rule 43(b). Such testimony, however, even if it stood un-

contradicted, would not be binding upon appellant on this appeal. A party who calls an adverse party pursuant to Rule 43(b) *is not bound by the unfavorable testimony* of such party and it was so held in *Moran v. Pittsburgh Des Moines Steel Co.* (C.A. 3), 182 Fed. 2d 467, at page 471, wherein the Court stated:

> "Here, Jackson was called in the first place as an adverse witness under Rule 43(b), which expressly provides that such an adverse witness may be contradicted and impeached. Rule 43(b) we think is utterly inconsistent with any notion about being bound by his testimony."

The detailed consideration to the foregoing principles given here was made necessary to avoid any confusion that might otherwise result from the misleading manner in which the facts are presented in appellee's brief. The only contention made by appellee in his endeavor to justify the extraordinary ruling of the trial Court by which appellant has been denied her constitutional and statutory right to a trial by jury is the alleged insufficiency of the evidence. The record bearing on this question will therefore be reconsidered and viewed in its proper perspective.

B.

APPELLEE'S BRIEF COMPLETELY OVERLOOKS THE VERY SUBSTANTIAL EVIDENCE IN THIS CASE TO SUPPORT A FINDING OF MALPRACTICE IN CONNECTION WITH APPELLANT'S CARE AND TREATMENT, AND RELIES PRIMARILY ON DISPUTED EVIDENCE WHICH IT IS CLAIMED EXCUSES OR EXCULPATES HIM FROM RESPONSIBILITY FOR HIS PROFESSIONAL NEGLECT.

This is the case of the victim of an automobile accident who was brought to a modern and well-equipped hospital and placed under the care of a physician and surgeon, but was allowed to suffer excruciating pain until her 39th hospital day before her attending physician eventually discovered that her injuries included a broken neck, although he had suspected such an injury without making any real attempt to treat her for this condition. It is also a case in which the same patient was allowed to suffer from a broken back for 18 days without treatment, notwithstanding the fact that the possibility of compression injury was disclosed by an X-ray report received by her doctor a few days after he assumed responsibility for her care.

We stated in our opening brief that there was ample evidence from which the jury could have found the appellee guilty of malpractice on each and all of the following theories:

(a) Failure to exercise due care and skill in making his diagnosis of appellant's injuries, and not making proper use of available X-ray equipment and other diagnostic facilities.

(b) Negligence in the care and treatment of appellant's known injuries, and in failing to immobilize her

or otherwise protect her from further aggravation of her injuries until a more definite diagnosis could be made.

(c) Negligence and breach of duty in failing to inform appellant as to the serious character of her injuries, and in failing to suggest consultation with an orthopedist. (Appellant's Opening Br. p. 18).

An outline of the pertinent testimony upon which the foregoing conclusions are based was presented in our opening brief at pages 12 to 18, inclusive. Appellee is unable to claim, and his brief does not even remotely suggest, that there was the slightest inaccuracy in any of our statements concerning the evidence in this case. To the contrary, his criticism, as summed up at page 51 of appellee's brief, seems to be that we are said to have picked out "isolated statements" from the testimony of Dr. McGrath and other hostile witnesses "to justify the position of the appellant that there was evidence sufficient to carry her case to the jury" and that what we "did not say or point out is far more significant" than what we did. It turns out upon further analysis that what counsel really means is that we have had the temerity of refusing to accept or to give probative value to defendant's testimony in conflict with our own, or to testimony from adverse parties testifying under Rule 43(b). What appellee has blindly failed to understand throughout, however, is that this was not only our privilege, but also our duty if proper effect is to be given to the appellate rules under which this cause is to be submitted.

Thus, appellee in expressing his supposed grievances at page 52 of his brief states that "what counsel did not say was that three times Dr. McGrath tried to persuade appellant to let him put a neck brace on her and that she swore at him and said, 'I won't wear that thing'." This reference is, of course, to testimony given by Dr. McGrath, as a witness called under Rule 43(b), and, as we shall point out, was utterly contrary to testimony concerning the same incidents previously given by the plaintiff as a witness on her own behalf. Appellee obviously takes the absurd position that we had no right to reject or deny credence to anything said by the defendant on the witness stand, even though he is the defendant and his statements were merely contradictory in character and in the form of evidence elicited under Rule 43(b).

To continue with another example, appellee's brief rebukes us with the statement that "what counsel did not point out was that he (Dr. McGrath) had ice-packs placed on each side of the neck and tried to have them kept there, but the appellant would not tolerate that and would throw them out on the floor." The supposed conduct is completely at variance with the circumstances as they were explained in the testimony of the plaintiff, and our retort to this statement is the same as before.

By way of further reproach, but this time in a more sinister manner, appellee states that "what counsel did not point out was that as soon as the appellant had recovered sufficiently from the delirium tremens to be placed upon the X-ray table, this was done. . . ."

This statement is not only no more defensible than the others, but is more odious in that it assumes as a proven fact in this case that the respectable lady in question was addicted to alcoholism. The opinion testimony which the defendant doctor gave in a rather despicable attempt to avoid responsibility for his professional neglect is the only real evidentiary support for this calumny. Even if it had any basis in fact, which we vigorously deny, it would not constitute even a partial defense in this case.

We turn for a final example to the assertion in the concluding paragraph on page 52 that "what counsel did not point out was that Dr. McGrath had not only a seriously injured patient, but an uncooperative one." Most of the evidence in this case, including the hospital records, is, as we shall demonstrate, definitely to the contrary. Surely, however, the responsibilities of the medical profession are such as to require not less, but perhaps even greater, care for an intractable and unruly patient than for one who is meek and submissive.

We repeat, therefore, that what appellee would have us do is to cancel out all of the favorable evidence and accept only facts which are claimed to be shown by his own testimony as evidence in this case. This is a trap into which we do not choose to fall.

C.

THE EVIDENCE, WHEN FAVORABLY CONSIDERED, ENTITLES APPELLANT TO HAVE THE ISSUE OF MALPRACTICE SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS COVERING EACH OF THE FOLLOWING THEORIES: (A) FAILURE TO EXERCISE DUE CARE AND SKILL IN DIAGNOSING HER INJURIES; (B) NEGLIGENCE IN THE CARE AND TREATMENT OF HER KNOWN INJURIES, AND (C) NEGLIGENCE AND BREACH OF DUTY IN FAILING TO OBTAIN CONSULTATION WITH AN ORTHOPEDIC SPECIALIST.

Because of the wrong emphasis that appellee has placed on the evidence in this case in his brief, we deem it necessary to enlarge our former statement by specific reference to some of the testimony upon which we rely for support. The questions raised by appellee's brief as to the existence of or necessity for expert testimony to entitle appellant to a recovery in this case will be discussed under another heading. In this recapitulation, the facts will therefore be considered in a general way and, under the applicable rules, in the light most favorable to appellant.

1. There was substantial evidence to justify a jury finding that appellee failed to use the requisite care and skill in diagnosing appellant's injuries.

Immediately upon her arrival at the hospital following the unfortunate accident that occurred on October 19, 1952, Dr. McGrath had X-rays taken of appellant's cervical spine, and also her chest and ribs. The doctor testified that he determined what X-rays should be taken and that they were obtained under his direction (R. 119).

She was still in a state of shock when she was later transferred to a private room, where she was

again examined by Dr. McGrath. He described her critical condition at this time in his testimony as follows:

> "Q. What were her complaints at the time you first examined her after she was taken to her room?
>
> A. Still complaining of *severe pains in her neck radiating up to the back of her head* and pains in the left side of her chest.
>
> Q. Did she give indications to you of being in very severe pain?
>
> A. Yes."
>
> (R. 121).

A few days later he received Dr. Morris' analysis of the first series of X-rays. This was the report in which the radiologist referring to the views showing the thoracic spine, stated that the "possibility of compression injury is not ruled out." Despite this very alarming possibility, however, Dr. McGrath made no further attempt to diagnose the nature of this injury whatever until November 5th, when he finally had another X-ray taken of the thoracic spine. The radiologist's interpretation of this film was received on November 6th, and it was not until then, after his unfortunate patient had been in the hospital for 18 days, that there was even the remotest attempt in the way of treatment or cure for her back injury.

The original X-rays of the neck were negative for bony pathology. A reason for this may very well be the one given in Dr. Bolker's report of November 26th:

"A previous lateral view of the neck taken with the neck in extension produced a reduction of this dislocation fracture so that it was not apparent on examination of 10/19/52."

(R. 156).

Be that as it may, no further attempt was made to use the X-ray as an aid to diagnosis of her neck complaints, which caused most of her intense suffering, even when she was on the X-ray table on November 5th for X-rays of her back, until the cervical films that were taken on November 18th. A final set of X-rays of the injured area were taken on November 20th and it was not until November 26th, her 39th hospital day, after the radiologist's report for this group of films was received, that there were any belated attempts at treatment for her broken neck.

The doctor's testimony showed that he was certainly aware of the ordinary symptoms of a cervical fracture:

"Q. Now, assuming as it now appears, there was a neck fracture in this case, what are the usual symptoms of a neck fracture?

A. Pain, may have instability of the head, may not be in proper position, or may or may not be angulation or asymmetry.

Q. Unless there is some neurological signs, and by that I mean some paralysis, or some outward manifestation of the nerve injury, those would be about all the ordinary symptoms of a neck fracture; isn't that correct?

A. That would be the major portion of them, majority of them."

(R. 164).

Furthermore, Dr. McGrath testified that his knowledge of orthopedics was gained in large part from Key and Conwell, the authors of a well-known medical text entitled "Fractures, Dislocations and Sprains," and that this was the only authority on the subject with which he was familiar. (R. 253). He stated that he had therefore naturally evaluated this work, both in arriving at his conclusions on the case, and in connection with the opinions expressed by him on the witness stand. (R. 252-253). Several pertinent quotations from these eminent authors were therefore read into evidence, and this is what they have to say at page 381 of their text concerning the symptoms for recognizing cervical fractures:

> "Diagnosis of Fractures and Dislocations of the Atlas and Axis. The stiology and symptoms are those of other cervical dislocations and stiffness in the neck and fixation of the head in an abnormal attitude. If the patient is not paralyzed, he will *tend to support the head with the hands* and is unwilling to relinquish this support to another person. Sudden death may occur at any time from a sudden displacement of the head with a pinching off of the medulla. It is, of course, impossible to determine by physical examination whether or not the odontoid process is fractured in these upper cervical lesions. However, *such a fracture should be suspected if the patient has a marked sense of instability of the head on the neck.*"
>
> (R. 258).

From the hospital records, the testimony of the witnesses, and the fact that she did have a broken

neck, it is apparent that the foregoing symptoms were present during all of this time. Her own testimony in this regard is as follows:

"Q. Getting back to this neck condition; will you describe that in more detail as to the type of pain it was, and what difficulty, if any, you had?

A. Well, that night when I told them my neck hurt so bad, and complained about my neck, Doctor McGrath wanted to slide one of those things over my head, but the pain just was excruciating. I just couldn't stand it, couldn't even let him touch my head was so sore. It *kept getting worse every day,* the pain in my head.

Q. Now did you tell the doctor this first time on the first examination about the pain and condition of that?

A. Oh, yes, Mr. Lazarus.

Q. Were you able to move your neck about all right?

A. No, no. *I had to pick my head up to move it from one spot on the pillow to the other."*

(R. 45, 46).

"A. Every time I told Doctor McGrath—'Doctor McGrath, my neck, I can't stand it, I can't stand it,' he said to me, 'Those are bruises and when bruises come to the surface they hurt worse.' He then said they were deep bruises coming to the surface.

Q. Now on the following day, Monday, without taking it hour by hour, will you describe the condition you observed and felt generally through the day on Monday? What complaints did you have generally on Monday?

A. I felt worse. *I felt worse every day.*

Q. Did you have intense pain of any kind?

A. I had this pain—*most of the pain was here in the back of my neck, and shooting up into my head.*

Q. *Did you still have difficulty in moving your head or neck?*

A. *Oh, I couldn't.*"

(R. 48).

"Q. Now did you tell the Doctor about your complaints on your second hospital day, or Monday?

A. Yes, Mr. Lazarus, *every day I was in the hospital I complained.*

Q. Now did this neck condition improve the third day?

A. No, *it got worse.*"

(R. 49).

"Q. Now after you came out of this condition you referred to, what about the condition of your neck, was there any difficulty there?

A. *My neck kept getting worse every day,* Mr. Lazarus.

Q. Do you have pain elsewhere besides in the area of the neck area?

A. All of this side. Of course, I thought it was ribs, whatever it was here from my back and across here (indicating)—my left side.

Q. Did you continue to inform the doctor as to these complaints?

A. Yes."

(R. 53).

Mrs. Sidney Cox testified to the following observations during the time that she visited her sister when she had her hallucinations:

"Q. Did she make complaints as to her physical condition?

A. Oh, yes, her pain—she kept saying, 'My pain, Sidney, I can't stand it, help me.'

Q. Where was she complaining of the pain?

A. In her neck. *She held it at the time.*"

(R. 395).

"Q. Now the complaints during Saturday, the last day you were there on this trip, did she continue to make these complaints?

A. Yes, sir, it was her neck, her neck, and every minute, 'Sidney, it is my neck, something is wrong.' "

(R. 397).

Dr. McGrath, in fact, "suspected she probably had a fracture" (R. 124) and his provisional diagnosis appearing in the hospital record under date of October 19th was: "Severe shock, fracture 1st and 2nd cervical vertebrae and 6th dorsal, multiple bruises and abrasions." (Pltf's. Exh. 1.) Later, after receiving the negative X-ray films of this part of her anatomy, he "began to feel she *possibly* didn't have a fracture in the cervical region." (R. 142).

He admitted that it was standard practice in the hospital, moreover, to continue to treat the patient's symptoms, although X-rays taken as an aid to diagnosis for possible fractures might be negative.

"Q. Now it is a fact, is it not, that in the treatment of a patient where X-rays have been taken as an aid to diagnosis for possible fractures that if the X-rays are negative that the doctor still continues to treat the symptoms, isn't that correct?

A. If the patient will allow you to, yes.

Q. And that would be the standard practice in the hospital in which you were connected?

A. Yes, you couldn't force your treatment on to any individual."

(R. 164, 165).

Obviously, from the evidence, the doctors in the Weiser Memorial Hospital knew, as does everyone else, that X-rays, while a most valuable aid in diagnosing fractures, are far from infallible, and that follow-up films should always be taken when suspected fractures are not disclosed by the original X-rays. Dr. Coats' testimony in this regard was as follows:

"Q. Can you say on the basis of your experience whether or not the initial X-rays taken in the case of bone injury always demonstrate the existence of a fracture?

A. Not always, no."

(R. 287).

"Q. I believe you said it is true that an X-ray doesn't always disclose fractures?

A. That is correct.

Q. But if an X-ray doesn't disclose a fracture, what do you do about it?

A. *You would certainly get more X-rays.*"

(R. 301).

"Q. In other words, if a negative X-ray in a fracture case, and there was nothing else of any particular consequence that came to your attention in the treatment of the patient, you would accept that finding of the radiologist; wouldn't you?

A. That is right.

Q. But on the other hand, if in your treatment of the patient you observed symptoms and complaints, it would indicate that notwithstanding any negative X-ray film there was still maybe some serious condition, I take it you would take more film; is that correct?

A. Yes."

(R. 312).

Under the authorities cited and considered in our opening brief at pages 24 to 33, the failure of a physician and surgeon to make proper use of X-ray facilities as an aid to diagnosis in cases of doubt, renders him responsible to the patient for all injuries and damage resulting therefrom. Many of these cases involve neglect in the failure to take follow-up X-rays where indicated for proper diagnosis and treatment. Appellee's brief does not question the legal principles established by these decisions, and the standards of care that they require on the part of members of the medical profession is conceded without argument here. Indeed, as we shall further point out, appellee's brief admits by implication the duty of a doctor to make adequate use of available diagnostic facilities in treating his patient, but relies almost entirely on opposing evidence which he claims, if accepted, would excuse

his failure to make proper use of the X-ray in the instant case. How then can it be said that appellant did not produce evidence entitling her to have the matter of liability submitted to the jury under this theory of her case, if the formidable testimony that we have outlined above is to be favorably regarded?

The supposed exculpatory facts upon which appellee bases his defensive arguments may be summed up as follows:

(a) The claim that Dr. McGrath is protected by the negative report concerning the original X-rays taken of appellant's neck, and that he was thereby entitled to close his eyes to the situation with which he was thereafter confronted, and the torment which was understandably suffered by his patient. (b) The argument that she was in a state of shock and in such a painful condition that it would have been imprudent to have her placed on the X-ray table. (c) The aspersion that she was suffering from delirium tremens, and that she could not therefore be subjected to the restraint necessary to take additional X-rays.

While testimony of this kind, intended by way of justification of appellee's conduct, might have been properly considered by the jury in deciding this case on its merits, it has no validity for purposes of this appeal under the appellate rules that we have again been obliged to emphasize in the preliminary part of this brief. This, as we have already pointed out, is because it was in the nature of anticipated defenses to meet the *prima facie case* established by plaintiff,

it was in conflict with plaintiff's evidence and came almost entirely from witnesses called under Rule 43(b). Although we would be entitled to therefore completely disregard any evidence in support of these contentions in this proceeding, we nevertheless, for purposes of this argument, intend to assume the unnecessary burden of showing that even if it was entitled to be weighed along with other evidence in the case, it would not support the conclusions contended for by appellee.

The argument that a doctor who has a critically injured patient on his hands, a patient who might be permanently crippled or whose life might be momentarily snuffed out by the slightest movement because of suspected fractures of the spinal column, can disregard the X-ray as a further means of diagnosis merely because a few X-rays hastily taken at the beginning of the case did not disclose the suspected fractures just doesn't make sense. The role that the X-ray has played in saving human life and in preventing deformities from broken bones has made this marvelous discovery one of the greatest boons in the history of mankind. But every layman as well as every doctor knows that this three-dimensional form of photography by which medical science has now been able to project shadowy images of the human skeleton into a camera is often far from perfect in its results. Frequent X-rays of even the larger bones of the anatomy are often taken before the radiologist can detect what are afterwards found to be rather conspicuous fractures. Even among the experts, one

radiologist will often find anomalies that were completely overlooked by another.

Some of the factors affecting the value and quality of the results, such as positioning and technique, were touched upon in the testimony of Dr. Morris and may be found in the record at pages 319 and 320.

The problems in getting good X-ray pictures of the cervical spine are even more difficult than usual because of the contour and small size of the vertebrae and bony processes. The particular care necessary to endeavor to discover fractures in this region by X-ray is well shown by the following statement from Key and Conwell, read into evidence by Dr. McGrath:

> "In taking x-ray pictures of the atlas and axis, lateral pictures are taken in the usual manner, while antero-posterior pictures are taken *through the wide open mouth.* It is important when taking them through the mouth to so direct the rays that the shadow of the occiput does not impinge upon that of the upper cervical vertebrae. The tendency is to slant the x-rays too far upward and backward, with the result that the occiput clouds the picture of the first and second cervical vertebrae. For this reason they should be carefully directed in such a manner that they run parallel with a line drawn from the edges of the upper incisor teeth to the base of the occiput."
>
> (R. 259).

The two X-rays of the neck taken by Dr. McGrath were a lateral and an anterior-posterior view. One

of the many reasons why these photographs may not have revealed the fracture is indicated by the portion of the report of Dr. Bolker referred to above. Another may very well be that the anterior-posterior X-ray taken by Dr. McGrath on October 19th was not taken through the mouth, and presumably the rays were not slanted as recommended by Drs. Key and Conwell.

The fact that Dr. McGrath knew that the possibility of neck fractures could not be ruled out on the basis of the report on the X-rays taken on October 19th is clearly indicated by the circumstance that when he finally decided to again use the X-ray as an aid to diagnosis on November 18th he had *six* views taken of the neck and skull (R. 332). Even with this number, the radiologist's report, after noting certain anomalies, stated that "it is believed that the odontoid process is intact." (R. 153). It was not until the report was received in connection with the final series of *four* pictures taken on November 20th that the multiple fractures were definitely established by X-ray evidence.

And what excuse does Dr. McGrath give for not bothering to take follow-up X-rays? We quote his testimony:

> "Q. Well, you knew as a practicing surgeon and physician, did you not, that X-ray views, particularly of the cervical area because of the bones and everything are not always an infallible method of diagnosis; did you not?
>
> A. The radiologist did not recommend I take any more films."
>
> (R. 135).

Appellant placed herself under the care of her physician and surgeon, not the radiologist. How would Dr. Morris know that any further X-ray films were indicated when it is admitted in the testimony of Dr. McGrath that he never at any time notified Dr. Morris that the same aggravated complaints and symptoms that indicated the possibility of serious neck injury still continued? (R. 137). The doctor cannot shift his obligations to his patient to the radiologist, and if he was still in doubt after receiving the initial X-rays, he owed it to his desperately injured patient to use the means at hand for a more definite diagnosis. If Dr. McGrath had a patient who had all the symptoms of a broken neck, did he have any right to rule out this possibility merely because the two X-ray films which he, himself, directed to be taken did not confirm his provisional diagnosis?

To paraphrase the language quoted from *Stagner v. Files* (1938), 182 Okla. 475, 78 P. 2d 418, at page 30 of our former brief, *if the circumstances were such as to create any doubt as to whether or not appellant may have had fractures of her cervical spine, the defendant was negligent in failing to use the methods known to him by which the extent of her actual injuries could have been discovered.*

The argument that appellant was in a state of shock and was in no condition to have X-rays taken is likewise untenable, and may be quickly disposed of. Dr. McGrath testified that she was only in shock for three or four hours, and on her second hospital day she was no longer in shock (R. 123). If the doctor

now claims that she was in such agony that she could not safely be placed on an X-ray table, this is certainly not the impression that he had after she was in the hospital for a few days, according to appellant's testimony.

> "Q. Now did the doctor make any statements to you with regard to your condition, any subsequent statements around the third or fourth day?
>
> A. Except that I should be able—as soon as I could walk I could do down to a hotel in Weiser, rest there, and then I could go on home.
>
> Q. The first three or four days were you able to get up and walk around at all?
>
> A. I tried to walk around the bed and I *would hold my head.* In fact, I did that for weeks and weeks, and tried to walk because my legs were getting weaker all the time. You can't lie in bed and get strong."
>
> (R. 49).

In any event, in so far as her neck was concerned, it would have been a very simple matter to have taken X-rays of that part of her anatomy *when she was on the table to have her back X-rayed on November 5th.* Dr. Bolker was the regular staff radiologist for the hospital and he visited there every Wednesday. If there were any problems in connection with obtaining further X-rays, presumably he could have been consulted, but this was never done.

The final and complete answer, however, is that no matter what appellant's condition was, the hospital was equipped with *portable X-ray equipment* which, if necessary, could have been moved to her bedside,

if Dr. McGrath was as solicitous about the ordeal of placing her on the X-ray table again as he says he was (R. 121, 286-287). A broken neck is certainly a very painful injury, and the argument made by appellee is tantamount to saying that follow-up X-rays should never be taken in a case where a fractured cervical spine is suspected.

We come now to the contemptible insinuation that the delirium that manifested itself after appellant had been in agony in the hospital for several days without anything being done for her care or cure other than to drug her with opiates was what is commonly known as delirium tremens. This scurrility is predicated solely upon so-called opinion testimony given by Dr. McGrath, solicited by questions put to him by his own counsel while he was on the witness stand under Rule 43(b).

All of the direct evidence on this subject is to the effect that this reputable lady never indulged in alcoholic beverages except in the form of an occasional social drink, and then in moderation (R. 104-105, 406, 438-440). The best proof of her sober habits is in the fact that she was continuously employed in a responsible position by a large and very conservative San Francisco firm for 17 years (R. 38-39).

Admittedly appellant had more drinks than she would customarily take on the Saturday night that was to wind up her vacation in Idaho. But instead of the carousal pictured in appellee's brief, here is what actually took place as the events of that evening were more accurately portrayed by the testimony of appellant:

"Q. Isn't it a fact that every night—let's say practically every night, you and Soden and others there drank in both of those bars, in Council?

A. Of course, by drinking, Mr. Martin, I don't know exactly what you mean. Do you mean I had a cocktail before my dinner and a few drinks during the evening while I danced, if that is what you mean, I did.

Q. How many drinks would you have after dinner?

A. When you are supposed to be enjoying yourself you don't count them.

Q. You didn't keep track of them, did you?

A. Four or five.

Q. All right, maybe more?

A. I doubt it very much.

Q. And you drank until one o'clock when the bars closed?

A. I did what?

Q. You would drink there and stay in those bars until one o'clock in the morning when they closed?

A. Not every night, Saturday night I did."

(R. 92, 93).

This, then, is the extent of the debauchery that appellee would have us believe occurred on appellant's last night in Idaho. It is also significant that despite the attempt to create the impression by the Rule 43(b) testimony of Dr. McGrath that his patient had an alcoholic breath when she was brought to the hospital, there is no mention of this in any way in the hospital records. This, although the records kept at the Weiser Memorial Hospital were very detailed and exact, and included all of the usual entries.

There is no doubt that on the evening of appellant's fourth hospital day she became delirious and developed hallucinations as described in the nurse's entries in the hospital records. This lasted for a few days. At the end of that time she became quite rational again. The following entry was made by the nurse on duty on October 25th, her sixth hospital day: "Patient completely oriented today. Is aware of all her confusion yesterday and is eager to be cooperative." Typical entries for the next few succeeding days are: "Good day" and "Resting well".

Mrs. Cox testified that when she went to the hospital to see her sister on Saturday morning, October 25th, she appeared to be perfectly normal again (R. 397), and that Dr. McGrath came into her room and after an examination said: "Your sister is all right now." (R. 398). The statement on page 17 of appellee's brief that "appellant had suffered from the delirium tremens over this period of some *two weeks*" is therefore a compound fabrication.

It is common knowledge that there are many forms of delirium that follow severe injury or, more often, as we learned from our war experience, from fatigue or anxiety. Dr. McGrath's testimony indicates that the only experience that he has had with delirium, however, is the brand suffered by the common drunks attended by him in the county jail. Dr. McGrath, in his unwarranted assault on appellant's character, would place appellant in the same category.

Why, if Dr. McGrath believed that his patient was suffering from delirium tremens, did he not indicate

his findings by an appropriate entry in the hospital record? Could it be that this was merely a convenient afterthought, a diagnosis made after he became a defendant in a lawsuit?

Let us suppose, however, that the appellant instead of being the respectable and decent business woman that she was, was a weak and unfortunate tippler who had sunk to the depths of dipsomania. Let us suppose that she was, in fact, suffering from delirium tremens. The fine traditions of our medical profession are such that the wretched and the lowly can expect the same consideration from their medical attendant as those who have not succumbed to human frailty. If there was any problem about putting her on an X-ray table during the few days that her delirium was acute, why then wasn't something done after she was restored to normalcy? Why, with an X-ray report indicating that his patient might have a broken back, did Dr. McGrath wait until November 5th before taking additional X-rays of the thoracic spine? And above all, why did Dr. McGrath wait until the 18th day of November before making use of the X-ray as an aid to diagnosis for her neck condition?

2. There was substantial evidence to justify a jury finding that appellee was negligent in the care and treatment of appellant's known injuries.

Dr. McGrath certainly knew how imperative it was to take immediate steps to immobilize possible fractures, or other serious injuries of the neck. This undoubtedly appears from the following testimony:

"Q. And now, Doctor, you knew at that time, of course, that if it was a suspected neck fracture or serious injury to the neck it was very vital and important to immobilize the area, did you not?

A. Yes, I attempted to.

Q. I didn't get that.

A. I attempted to immobilize.

Q. But you knew that was very important to do, did you not?

A. Sure, any injury to the neck it is very important to immobilize.

Q. The reason for that, is it not, Doctor, because unless injuries of the neck, particularly fractures, are immobilized promptly considerable damage to nerves, nerve roots, cord and surrounding tissue could be done; is that correct?

A. That is very possible.

Q. And you knew it too, did you not?

A. Yes.

Q. That is, Doctor, as a matter of fact, *it is a matter of common knowledge in the medical profession, almost universal knowledge that neck injuries or suspected fractures should be immobilized; am I correct in that regard?*

A. *That is correct.*

Q. And I think you have already stated the reasons for it because of the possibility any movements of that very mobile part of the skull might cause further serious damage; isn't that correct?

A. Yes, sir."

(R. 159, 160).

Presumably he also consulted the medical text that he made use of in orthopedic cases before undertaking to treat a serious case of this kind, and, if so, he

found the following statements that were later read into evidence from Key and Conwell:

> "In all fresh dislocations and fracture dislocations the patient should be handled with extreme care because *one of the most important considerations is to protect the spinal cord from further damage,* and unguarded movements or manipulations on the part of the patient or surgeon may result in severe damage to the cord or even death. For this reason the patient should be placed immediately on a stretcher or hard bed without a pillow under the head, but with the sandbags or hard pillows on either side of the head, and should be moved with great care."
>
> (R. 254).

> "It is unwise, however, to attempt to make the diagnosis of such a dislocation by physical examination; for when a dislocation or fracture dislocation of the atlas and axis is suspected, great care should be taken not to subject the patient to injudicious manipulations. He should be placed on a bed or stretcher at the earliest possible moment with the head in a position of hyperextension *supported by sandbags.*"
>
> (R. 258, 259; emphasis added).

Let us look to the transcript again, therefore, to see what, if anything, was done by Dr. McGrath to comply with these elementary requirements for the proper treatment of serious neck injuries. He claims in his brief that he did, in fact, endeavor to immobilize the injured area. He also raises, in addition to the affirmative defenses that have already been discussed, the contention that he was unable to render proper treat-

ment because he had an obstreperous and uncooperative patient on his hands. He also argues that there were more immediate concerns in connection with the treatment of his patient which excused him from doing anything further. Since we are not bound by his testimony, we are considering it here solely for purposes of this discussion, and we do not wish to be understood as conceding that it has any more weight than that to which it is entitled.

His testimony discloses that the most that might have been done by him in an endeavor to immobilize appellant's injuries was to place icebags alongside of her neck and to try to persuade her to wear a cervical brace of some kind that he had in his office.

There is no doubt from the hospital records that one or more ice bags were for some reason placed alongside plaintiff's neck at the beginning of her stay in the hospital. It is a matter of general knowledge that ice bags are commonly used in cases of injury to relieve pain and swelling.

The voluminous hospital records evidencing the treatment received by appellant at the Weiser Memorial Hospital include two pages of instructions given by Dr. McGrath for the guidances of the nurses on duty. It is strange, is it not, that if Dr. McGrath felt that her neck should be immobilized by the use of ice bags, or by any other means, no directions in that regard were included in his instructions?

We have also carefully scanned the entries in the nursing record for any references that they may

contain concerning ice bags. The only pertinent notations that we have been able to find during the period in question are as follows:

1st hospital day, 1:00 A.M.: "Ice bag to neck"

1st hospital day, 12:30 P.M.: "Ice caps to side of neck"

1st hospital day, 5:00 P.M.: "Ice caps to sides of neck"

3rd hospital day, 6:30 P.M.: "Ice cap to neck"

This is all. Two of these entries indicate that only one ice bag was applied, which could not have possibly been for the purpose of immobilization. Also, the nurses kept a very careful record of everything else done by the patient which should be known to her treating physician. If appellant had been a recalcitrant patient who threw away ice bags which her doctor had ordered to be kept in place to safeguard her from further injury, surely some notation of this lack of cooperation would have been found in the nursing record.

We next refer to the argument that Dr. McGrath discharged his duty to safeguard and protect his patient from further injury when he endeavored to persuade her to wear the neck contraption. According to plaintiff, the only time that the doctor ever suggested that she wear a brace was on the first night in the hospital when Dr. McGrath "wanted to slide one of those things over my head, but the pain was just excruciating. I just couldn't stand it, couldn't even let him touch my head it was so sore." (R. 46).

The doctor denied by his testimony that he made any attempt to apply the brace, but in his version of the evidence stated that he merely "showed it to her and explained to her what it was for." (R. 126). He testified at the trial that he attempted to do this on three different occasions during the first two days of her confinement (R. 184), although he recalled only two such occasions when his deposition had been previously taken (R. 241-244). Be that as it may, it is admitted by his own testimony that *after the second hospital day he abandoned all further attempts to immobilize her injured neck.*

> "Q. Did you at any time subsequent to the second hospital day, I believe it was, put this neck brace or harness, whatever it was, on her?
> A. No, sir.
> Q. Now did you ever suggest it to her again?
> A. No, sir."
> (R. 146, 147).

With all of the facilities available to him in this modern hospital, the doctor was thereafter heedless of his patient's misery and did not take a single step in the way of alleviative or protective measures. He made no attempt to use sandbags or traction, or to put her in plaster of Paris, nor did he even endeavor to have her fitted with a more suitable kind of neck brace. He did not warn her of danger or advise her of the seriousness of the situation, and permitted her to walk around with knowledge of the possibility that she had a broken neck (R. 141). The statement on page 47 of appellant's brief that what Dr. Loutzen-

heiser did immediately upon appellant's return to San Francisco in placing her cervical spine in traction was exactly what Dr. McGrath wanted to do with appellant on the first or second day she was in the Weiser Memorial Hospital is an absolute and unmitigated falsehood.

The argument that the doctor was confronted with a patient who was ungovernable and difficult to handle may be very quickly disposed of. This ridiculous supposition is not only unsupported by any evidence in the case, but is completely refuted by the following entries in the nursing records:

6th hospital day: "Eager to be as cooperative and pleasant as possible."

7th hospital day: "A good day"

9th hospital day: "Had good day"

10th hospital day: "Pt. rational seems quite cheerful"

11th hospital day: "A good day"

12th hospital day: "Up in chair. Tolerated very well."

13th hospital day: "Patient very pleasant and cheerful."

16th hospital day: "Pt. very talkative and cheerful."

(Pltf's. Exh. 1).

It is remarkable, indeed, that a patient in her condition and so completely neglected by her attending physician could maintain the tolerant and agree-

able disposition evidenced by the foregoing hospital entries. What more in the way of cooperation could Dr. McGrath expect from a lady who without medical aid was enduring the tortures of a broken neck?

Finally, we have no quarrel with the refrain running throughout appellee's brief that the responsibility of a physician and surgeon is to treat his patient first, and the injuries in their due time. We fail to see where it has any application here, however. Except, perhaps, for the first few days that she was in the hospital, all that the doctor had to look after was her broken back and her broken neck. How long was she to wait until the doctor got around to treating the very injuries that were responsible for her hospitalization?

Even if there had been some other undisclosed condition that made it imperative for Dr. McGrath to "take care of his patient first", this would still be no answer. It would have been his duty to attend to her other injuries just as soon as conditions permitted, as pointed out in the following language from the leading case of *Weintraub v. Rosen* (C.C.A. 7, 1938), 93 F. 2d 544, cited and strongly relied on in our opening brief:

> "It may be conceded that the injury to her head prevented an examination and treatment of her hip sooner than five days after the injury. However, this record discloses that the patient was in a condition to undergo an examination of her hip when she regained consciousness * * * We may safely assume from the evidence, therefore,

that appellees were negligent in not observing the condition of the patient's hip."

3. There was substantial evidence to justify a jury finding of negligence and breach of duty by appellee in failing to obtain consultation with an orthopedic specialist.

Appellee is a general practitioner, and without reviewing the evidence in that regard, we may safely assume from the testimony that appellee's knowledge and experience in the field of orthopedic injuries was very limited. Since spinal fractures are a particularly serious type of injury, requiring prompt and very skillful treatment, it unquestionably appears that he would under ordinary circumstances refer such cases to a specialist for treatment. This is his testimony in that regard:

"Q. Now, Doctor, in general practice, for example, do you treat cases involving fractures of various bones of the body?

A. Sometimes.

Q. When you say 'sometimes' I take it that there are certain types of cases you wouldn't?

A. That is right.

Q. Have you treated prior to the time that the plaintiff in this case came to the Weiser Hospital, or was brought to the Weiser Hospital, have you treated cases involving spinal fractures?

A. Fractures I would refer to other doctors.

Q. Then, as I understand you correctly, usually in a case where you have known or suspected spinal fractures you would then call in some specialist?

A. A known spinal fracture.

Q. What type of specialist would you call in on that type of a case?

A. Orthopedic surgeon.

Q. If it was a case where the patient was confined in a hospital would you have the specialist come to the hospital?

A. If the patient so desired.

Q. Now on these cases where you treated the spinal fractures where you felt you ought to call in a specialist, where would you have to call a specialist from?

A. Boise.

Q. Can you tell us approximately how many miles Boise is from Weiser?

A. It is 85 or 90 miles."

(R. 115, 116).

"Q. When you discovered from reading the X-ray on the 26th that there was a fracture of the odontoid process of the neck, and of the lamina of the first *first* cervical vertebrae, did you consider that an injury that called for treatment by a specialist?

A. Yes, when I received that report I did.

Q. How is that?

A. When that report was received I did. In fact, I had called him before I received the report.

Q. You figured that was an injury a little too far over in the book for an ordinary practitioner?

A. Yes."

(R. 219).

However, although he was asked on a number of occasions in the instant case about the advisability of calling in someone else, he declined to do so. Appellant testified that she got nowhere when she mentioned to him before her back injury was definitely diagnosed that perhaps "two heads are better than one" (R. 447-448). Mrs. Sidney Cox testified to the conversation that she had with the doctor during the first week that her sister was in the hospital when she said to him, "Dr. McGrath, I am terribly worried about my sister, don't you think it might be well if we could call another doctor in." The emphatic response that she recived was that there was "nothing to worry about" (R. 396). Appellant's son, Gardner P. Wood, testified that when he obtained a furlough to visit his mother on about November 18th or 19th, and after seeing the condition in which she then was, he said to the defendant, "Dr. McGrath, don't you think it advisable to get another doctor, just look at my mother, I don't like the looks of her," but received the same kind of evasive reply.

The above facts would appear to come squarely within the rule mentioned in our quotation at page 22 of our opening brief from *Tevedt v. Haugen* (1940), 70 N.D. 338, 294 N.W. 183. The *Tevedt* decision, as we also mentioned in our former brief, is the case that was so firmly approved and extensively quoted by the Idaho court in *Flock v. J. C. Palumbo Fruit Co.* (1941), 63 Idaho 220, 118 P. 2d 707. One of the principal grounds for the decision in the

Tevedt case was that a doctor who knows that he does not have the experience or facilities to properly treat a patient and that the services of a specialist are available and would be advisable, has a duty to call this to the attention of the patient. To put it another way, a doctor who, with knowledge of the fact that he does not have the requisite skill or training to undertake a particular kind of treatment ordinarily performed only by experts, cannot by concealing this from his patient escape responsibility for bad results.

D.

THE EVIDENCE ENTITLING APPELLANT TO HAVE THE ISSUE OF MALPRACTICE SUBMITTED TO THE JURY UNDER EACH OF THE FOREGOING THEORIES WAS, IN FACT, SUPPORTED BY EXPERT TESTIMONY.

Appellee's brief states flatly at page 61 that "appellant has not pointed to one scintilla of medical testimony to support his contention that he should not have been non-suited". This presupposes, of course, that such evidence was necessary in this case, which we do not concede. It is undoubtedly the general rule in malpractice cases that where the applicable standards depend upon knowledge of the scientific effect of medicine, or the result of surgery, they can only be shown by expert testimony of physicians and surgeons. This rule applies only to such facts as are peculiarly within the knowledge of such professional experts, however, and not to matters of gen-

eral knowledge of which the courts may take judicial notice.

Appellee cites *Huffman v. Lindquist,* 37 Cal. 2d 465, 234 P. 2d 34, and other cases to like effect, in support of the ordinary rule. It might be pointed out that in the *Huffman* case the Court said (p. 474):

> "While in a restrictive class of malpractice cases the court have applied the doctrine of res ipsa loquitur, that has only been where negligence on the part of the doctor is demonstrated by facts which can be evaluated by resort to common knowledge [and] expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact."

We will show in the section of our brief that follows this discussion that, at least in so far as negligence in assembling data essential for a correct diagnosis is concerned, this case comes within one of the well-recognized exceptions to the expert opinion rule. What appellee none the less overlooks, however, is that there was indeed considerable expert evidence to support each of the foregoing theories of recovery.

In that connection, we mention first something of importance that appellee has evidently failed to bear in mind. We refer to the fact that the expert testimony, where required to establish plaintiff's *prima facie* case, may be that of the defendant doctor called to the witness stand as an adverse party.

Dickow v. Cookinham (1954), 123 C.A. 2d 81, 266 P. 2d 63;

McCurdy v. Hatfield (1947), 30 C. 2d 492, 183 P. 2d 269;

Lashley v. Koerber, 26 Cal. 2d 83, 156 P. 2d 441;

Bowles v. Kinton, 83 Colo. 147, 263 P. 26;

Jacobs v. Grigsby, 187 Wis. 660, 205 N.W. 394.

The California Supreme Court put it this way in the *McCurdy* case (p. 495):

> "The negligence of the doctor may be established by his own testimony elicited under section 2055 of the Code of Civil Procedure. (*Lashley v. Koerber, supra; Lawless v. Calaway, supra.*) Although the defendant here did not expressly refer to the practice followed by other doctors in the community, he did testify as to what was proper practice, and *it is reasonable to infer that his testimony was based on the standard of care used by physicians in the locality.* If he failed to conform to the proper practice as set forth in his testimony, he did not act as a reasonable physician should under the circumstances." (Emphasis added).

We now meet appellee's challenge by confronting him with the following references to some of the very formidable evidence of an expert character in this case. We have already pointed out the testimony coming from Dr. McGrath and Dr. Coats indicating that it was "standard practice in the hospital" to take more X-rays when the possibility of fracture still appeared, notwithstanding a negative report in earlier films. Of course, as irrefutably shown by this evidence, a doctor would not stop his efforts to make a proper diagnosis and to heal his patient, merely because no anomalies were detected in the first

X-rays taken in the case, and nothing more need be said on that subject here.

With regard to the failure to immobilize appellant's neck injury, Dr. McGrath by his own testimony, also referred to above, admitted that he knew at the time that it was vital and important to immobilize such injuries, and that it was a matter of "almost universal knowledge in the medical profession" that neck injuries or suspected fractures should be immobilized. This also plainly appears from the testimony of Dr. Coats, not to mention the rudimentary principles of practice set forth in Key and Conwell which the doctor says were evaluated in treating his patient.

It is likewise an inescapable conclusion from the testimony already set forth that it is the sound practice of general practitioners on the staff of the Weiser Memorial Hospital, including appellee, to call in specialists in cases of spinal fractures, a practice that Dr. McGrath did not choose to follow in this instance until too late, although it had been suggested by appellant and members of her family.

We turn now to the expert evidence from which it may be reasonably inferred that because of Dr. McGrath's neglect the consequences of appellant's injuries were much more serious than otherwise, and resulted in permanent deformity that could no longer be remedied.

We have already quoted the testimony of Dr. McGrath that he knew that the reason for taking every precaution to immobilize the neck was "because un-

less injuries of the neck, particularly fractures, are immobilized promptly considerable damage to nerves, nerve roots, cord and surrounding tissue could be done". This probability is also shown by the testimony of Dr. Coats and the statements from Key and Conwell appearing in the record.

With regard to the broken back, Dr. McGrath testified that it was a fact that a compression fracture of the thoracic area usually changes the curvature of the spine and that such curvature, depending upon the amount of bone absorption, can not normally be corrected unless it is treated promptly (R. 162). He also gave testimony from which it may be freely inferred that the longer a fracture of this kind continues without treatment, the greater the damage from movement of the fragments and impingement upon the nerve (R. 250-251). There was similar testimony coming from Dr. Coats (R. 295-298, 308-309).

Dr. Loutzenheiser testified in his deposition that when he finally saw appellant the odontoid process was displaced about 15 degrees. He testified that an attempt to straighten out the upper spine by the use of traction was partially successful, but that "because seven weeks had elapsed since date of injury" he was unable to take the procedures necessary to make any correction in the thoracic spine (R. 370-371).

Appellee's brief makes the further point that none of the physicians who testified in this case mentioned Dr. McGrath by name, or condemned him or criticized

the procedures followed by him directly. The reluctance of one doctor under the exacting code of ethics followed by the medical profession to comment on the treatment rendered by another is very well known, and this is really expecting too much. Where expert testimony is required in a malpractice case, it is only for the purpose of establishing the proper standards of treatment. This can be shown by circumstantial evidence and it is not necessary for the witness to sit in judgment on his fellow-practitioner. The conclusions to be drawn from the surrounding circumstances are within the sole prerogative of the Court or jury. This distinction was aptly pointed out recently in the case of *Norden v. Hartman* (July, 1955), 134 A.C.A. 371, 375, 285 P. 2d 977:

> "The ultimate question which a jury must answer, and the question which an expert may answer for the purpose of furnishing evidence upon which the jury is to make up its mind, are not identical. Professional witnesses may testify concerning the teachings of their science and the customs of their craft, *but whether these things disclose due care presents a question for the court or jury.*" (Emphasis added).

E.

APPELLEE IGNORES THE AUTHORITIES CITED IN APPELLANT'S BRIEF IN SUPPORT OF THE WELL-ESTABLISHED EXCEPTION TO THE GENERAL RULE IN MALPRACTICE CASES THAT THE USE OF X-RAYS AS AN AID TO DIAGNOSING POSSIBLE BONE INJURIES IS A MATTER OF COMMON KNOWLEDGE, OF WHICH THE COURTS WILL TAKE JUDICIAL NOTICE WITHOUT THE INTRODUCTION OF EXPERT TESTIMONY.

The use of the X-ray has become such standard practice in the diagnosis and treatment of suspected bone injuries that, as unequivocally stated in many of the cases cited under the heading appearing on page 24 of our main brief, the Courts will take judicial notice of this requirement without the aid of expert testimony. Where such a failure is the basis for a claim for malpractice, it is therefore only necessary to produce evidence from which it might reasonably be inferred that the defendant doctor did not make proper use of available X-ray facilities in connection with his diagnosis and treatment of the patient to establish a *prima facie* case.

The most complete statement of the doctrine by the California Courts is in *Agnew v. City of Los Angeles,* 82 C.A. 2d 616, 619, 186 P. 2d 450 (failure to take X-rays that would have disclosed that the patient had a broken hip):

> "This is the sole question for our determination:
>
> "In view of the fact that there was no expert testimony that Dr. Larson had failed to use that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the

community where he resided, would the foregoing facts if believed by the trial judge make a prima facie case in favor of plaintiff sufficient to require the denial of defendant's motion for a nonsuit?

"This question must be answered in the affirmative.

"[1] *General Rule.* The law requires that a physician shall have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality, and that he shall use the same care and diligence in applying that learning to the treatment of a patient. [2] It is likewise the general rule that whether he has done so in a particular case is a question for experts and can be established only by their testimony. (*Trindle v. Wheeler,* 23 Cal. 2d 330, 333 [143 P. 2d 932].)

"[3] *General Exception.* To the above general rule there is this well-recognized exception, to wit, where the question of the propriety of the treatment is a matter of common knowledge of laymen, expert testimony is unnecessary in order to establish liability in a malpractice case.

"[4] *Specific Exception.* The use of the X-ray as an aid to diagnosis in cases of fracture or other indicated cases is a matter of common knowledge, and the failure to make use thereof in such a case amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in this community. *The court in the absence of expert testimony may take judicial notice of this fact.* (Citations).

"[5] It is evident in the present case that when plaintiff fell a possible fracture was indicated, and under the foregoing rules it is likewise apparent that *it was a matter of common knowledge, of which the trial court should have taken judicial notice that the ordinary physician of good standing in this community, in the exercise of ordinary care and diligence, would have had X-ray pictures taken of plaintiff's body when a fracture might have resulted from the fall.* In failing to do so defendant did not exercise the degree of learning and skill ordinarily possessed by physicians of good standing practicing in this community. Defendant Larson thus failed to use ordinary care and diligence in his treatment of plaintiff, with the result that plaintiff suffered personal injury. Therefore, the evidence which plaintiff introduced before the trial court established a *prima facie case* and it was error to grant defendant's motion for a nonsuit." (Emphasis added).

In the *McBride* case (*McBride v. Saylin,* 6 C. 2d 134, 56 P. 2d 941, another leading California decision, plaintiff consulted a general physician and surgeon for treatment of an injury to his eye, which had been struck by a nail. Some time later, it was found that there was a foreign body in the eye and the plaintiff lost the sight of that orbit. There was testimony that the customary means used by physicians and surgeons to determine the presence or absence of a foreign body in the eye are an ophthalmoscope and the X-ray. Neither instrument was used by the defendant doctor for purposes of examination. The Court said:

"Under the settled law of this state this evidence was sufficient to prove a *prima facie* case. (*Estate of Lances,* 216 C. 397 [14 P. (2) 768].) The legitimate inference which may be drawn from it is that Dr. Bulpitt should have suspected the presence of a foreign body in the eye; that he failed to exercise that degree of care which the practice of his profession requires, *in failing to make such examination as would make reasonably certain that there was nothing in the eye;* and that this was the proximate cause of the serious and unfortunate injury to plaintiff. The evidence would support such findings, and the action of the trial court in granting the motion for a nonsuit was unwarranted." (Emphasis added).

The same rule has been consistently followed by other Courts, and without repeating what has already been said concerning those decisions in our former brief, we refer particularly to the following cases:

Wilson v. Corbin (1950), 241 Ia. 500; 41 N.W. 2d 702;

Weintraub v. Rosen (C.C.A. 7, 1938), 93 F. 2d 544;

Stagner v. Files (1938), 182 Okla. 475; 78 P. 2d 418;

Kuhn v. Banker (1938), 133 Ohio St. 304; 13 N.E. 2d 242;

Flock v. J. C. Palumbo Fruit Co. (1941), 63 Idaho 220; 118 P. 2d 707.

Nor do the principles enunciated by these decisions apply only, as appellee infers without reference to

authorities, to situations in which the doctor has completely neglected to have any X-ray pictures taken. His responsibility to his patient is a continuing one, and he is under no less an obligation to take follow-up X-rays when indicated for proper diagnosis, and the cases cited by appellant so hold.

In the *Reynolds* case (*Reynolds v. Struble* (1933), 128 C.A. 716; 18 P. 2d 690), analyzed and discussed in our opening brief at pages 24 to 26, it was pointed out that the fact that the doctor had previously taken an X-ray which did not disclose the injury to his patient's arm was no excuse. The Appellate Court declared in its decision that the circumstances known to him "required *further* examination and the taking of *further* X-ray pictures to determine the true condition of the patient", and held that the court could take judicial notice of these requirements.

The factual context for the decision by the Iowa Court in *Wilson v. Corbin,* supra, was set forth at page 28 of our opening brief. There, X-rays taken the day after the plaintiff entered the hospital likewise did not show that he had a fractured vertebra. His physician was held liable, however, because during the six days that he thereafter remained in the hospital his physician, in the face of complaints that his pain did not subside, took no other X-rays and made no further examination. In addition to the language quoted on page 29 of our former brief concerning judicial notice of the requirement for adequate use of the X-ray as an aid to diagnosis of bone injuries, the Court had the following to say:

"Dr. Stindler testified compression fractures of the spine are frequently caused by such a fall as plaintiff's and that *location of the pain and history of the injury are important in indicating a compression fracture.* As stated, defendant was told about the fall and the resulting pain. Defendant's assistant Dr. Buchtel (whose deposition, taken by defendant, was offered by plaintiff) said *the pain of which plaintiff complained in his lower back and hips 'certainly did' create suspicion of a compression fracture* and in a fall like plaintiff's compression fractures may occur in the lower dorsal or any of the lumbar vertebrae."

* * * * * * *

"It seems almost self-evident that delay of nearly three months in diagnosing and treating a fractured vertebra would naturally cause damage. As stated in Wambold v. Brock, supra, 236 Iowa 859, 763, 19 N.W.2d 582, 585, 'In fact, *it is a matter of common knowledge that bone injuries, particularly fractures, should receive prompt attention.*' " (Emphasis added.)

The facts of the Ohio case recognized and cited by the Idaho Supreme Court as authority in *Flock v. J. C. Palumbo Fruit Co.,* supra, (*Kuhn v. Banker* (1938), 133 Ohio St. 304, 13 N.E. 2d 242) were summarized in our former brief at page 27. There, a number of X-rays had been taken by the defendant physician at various times during the early stages of treatment. The Court held however that the plaintiff was entitled to have the issue of negligence submitted to the jury on the basis of evidence that later on,

when she still complained of pain and grating in her leg, the doctor did not take additional X-rays to see if there was a proper union.

Indeed, appellee has not only ignored the authorities cited in our brief, but has without reason entirely misconstrued our position. He states, at page 58 of his brief, for example, that "while the appellant's brief does not contain any legal proposition to the effect that she invoked the doctrine of res ipsa loquitur, the argument and the entire brief indicates an attempt to do so." Appellee is in error and has built up an imaginary claim that has never been made. We have never invoked the res ipsa loquitur doctrine in this case. In arriving at this unwarranted conjecture, appellee has obviously confused the doctrine with the rule dispensing with the necessity of producing expert testimony to establish a *prima facie* case of malpractice where the circumstances relied upon are matters of common knowledge and experience, of which the Courts can take judicial notice.

CONCLUSION.

The same superficial attention has been given to the law in appellee's brief as was done in presenting the supposed facts. The cases cited in appellant's opening brief were completely by-passed by appellee without the slightest comment or criticism. None of the decisions referred to by appellee, on the other hand, dealt with situations that were even remotely similar

in fact or principle to those with which we are here concerned.

Presumably, since this is a case in which Federal jurisdiction is based upon diversity of citizenship, state law is to govern. It is to be noted, therefore, that appellee's brief refers to only three decisions by the Idaho courts, to wit, *Evans v. Bannock County,* 59 Idaho 442, 83 P. 2d 427; *Reinholdt v. Spencer,* 53 Idaho 688, 26 P. 2d 796, and *Willis v. Western Hosp. Ass'n.,* 67 Idaho 435, 182 P. 2d 950. It is difficult to see what solace appellee can find in any of these adjudications.

In the *Evans* case, the defendant hospital and physician were sued on the supposition that alcohol was used instead of novocaine during a herniotomy. However, all of the witnesses in the case testified that novocaine was used, and there was no evidence that alcohol had been injected. The reviewing Court therefore correctly sustained a judgment of nonsuit for the reason that plaintiff could not recover upon mere surmise or conjecture.

Counsel's reason for citing the *Reinholdt* case is even more difficult to understand. That was an appeal from an order denying defendant's motions for a nonsuit and directed verdict in a case where a hypodermic needle was left in plaintiff's chest. One of the grounds for the motions was that there was no competent evidence to show "that respondent suffered damage from or by reason of any act of negligence on appellant's part." The Appellate Court said, in affirming the judgment:

> "Damages, if any, flowing from an injury such as respondent sustained, that is, for pain and suffering and loss of income due to the particular injury, are susceptible to proof *only with an approximation of certainty, and it is solely for the jury to estimate them as best they can by reasonable probabilities* based upon their sound judgment as to what would be just and proper under all of the circumstances, which may not be disturbed in the absence of some showing that the jury were biased or prejudiced or arrived at the amount in some irregular manner." (Emphasis added.)

(citing a number of Idaho cases and also *Reynolds v. Struble,* the California case that is cited and discussed at pages 24 to 26 of our former brief, and upon which we strongly rely).

The *Willis* case involved an appeal from a judgment of nonsuit in a wrongful death action. The appellate court affirmed with the following assertion:

> "There is absolutely no competent substantial evidence to support appellant's allegation that the death of the deceased was due to the wrongful and negligent acts of the respondent while he was in the hospital at Orofino, or that his death was accelerated or in any manner contributed to by the acts or treatment he received while in said hospital."

While many California decisions are also cited in appellee's brief, none of them seem to have any application to the facts of this case. One of these authori-

ties, *Lashley v. Koerber,* 150 Pac. 272, cited and quoted in appellee's brief at pages 39, 31 and 55, can not even be found in the official reports of this state. This is because a hearing in that case was thereafter granted by the Supreme Court, which arrived at a contrary decision in *Lashley v. Koerber,* 26 C. 2d 83, 157 P. 2d 441, cited in our opening brief. Incidentally, the doctor in the *Lashley* case claimed that he knew that the plaintiff had a fractured finger when he first treated her, and that X-rays would have merely been a confirmation of his clinical judgment regarding possible fracture. He also testified that out of eight doctors in general practice in the community, seven of them had indicated that it was their custom to treat such fractures without invariably demanding an X-ray. It was held by the Supreme Court, however, in reversing a judgment of nonsuit by the trial Court, that the question as to whether or not the doctor had exercised a reasonable degree of skill and learning under the circumstances was a jury question.

Finally, appellee endeavors in his brief to create the impression that he is practicing medicine in a remote and isolated village, whose inhabitants had no right to expect the kind of skill and facilities for treatment that might normally be deemed proper. Actually, as shown by his own testimony, Weiser not only has a new and up-to-date hospital, but it is also the largest city in Washington County (R. 115). This argument completely vanishes, however, in the face of what was said by the Idaho Supreme Court in *Flock v. J. C. Palumbo Fruit Co.,* supra:

"*Physicians are required to keep abreast of and use the best modern methods of treatment, and in so doing they may not unduly and narrowly restrict or confine their responsibility to the immediate place where they are practicing.* We may take *judicial notice* that the distance between Payette and Boise is in the neighborhood of 65 miles, that the facilities at Boise are readily accessible to the respondent employee . . ." Emphasis added.)

It is our earnest belief that we have clearly demonstrated that the judgment of the trial Court denying to appellant her fundamental right to a jury trial has resulted in a miscarriage of justice, and that in accordance with law and the evidence the judgment should therefore be reversed.

Dated, San Francisco, California,
January 27, 1956.

Respectfully submitted,
TOBRINER, LAZARUS, BRUNDAGE & NEYHART,
D. L. CARTER,
Attorneys for Appellant.

No. 14808

In the United States Court of Appeals for the Ninth Circuit

HELMS BAKERIES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

RESPONDENT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D. C.

In the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges Thereof:

Comes now the Commissioner of Internal Revenue, the respondent in the above-entitled cause, by his attorneys, and presents this, his petition for a rehearing, with suggestion for a rehearing before the full Court, sitting *en banc,* in the above-entitled cause in which an opinion and judgment were rendered by this Court (by a panel consisting of Circuit Judges Orr and Chambers, and District Judge Jertberg) on August 14, 1956, and in support thereof respectfully presents the following reason:

That this Honorable Court, as demonstrated by its opinion (by District Judge Jertberg), in

deciding the present review, while properly declining to entertain the petition for review as to a question decided by the Tax Court under Section 722 (b) (2) of the Internal Revenue Code (1939) in appropriate observance of the prohibition against appellate review contained in Section 732 (c), has inconsistently and erroneously taken jurisdiction and reviewed the case as to a question decided under Section 722 (b) (4), and in so doing has violated the mandate of Section 732 (c) and ignored the prior holding of this Court (by a panel consisting of Circuit Judges Garrecht, Healy, and Bone) in the Waters case [1]; and that in the interests of justice this Court should therefore vacate and set aside its opinion and judgment and grant a rehearing *en banc,* so that the full Court may consider the matter.

In support hereof, the Commissioner respectfully shows the following:

1. By section 732 (c) of the 1939 Code, Congress unequivocally prohibited any appellate review of any decision of the Tax Court of any question determined "solely by reason of" Section 722—or by reason of any of the other so-called "abnormalities provisions" of the Second World War Excess Profits Tax Law.[2]

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[1] *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596, certiorari denied, 332 U. S. 767.

[2] In Section 732 (c), Congress stated:

Finality of Determination.—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

In this case, the only issues presented to the Tax Court for decision and attempted to be brought to this Court on review related exclusively to the taxpayer's right to relief under Section 722, and those were, specifically, (1) whether the taxpayer's base period earnings were depressed by reason of a price war within the purview of Section 722 (b) (2), and (2) whether it had increased its capacity for production and operation within the purview of Section 722 (b) (4). The Tax Court, after a hearing on the merits, had decided both issues against the taxpayer, denying relief both under subsection (b) (2) and subsection (b) (4).

The Commissioner before this Court, on brief and at the oral argument, took the position that Section 732 (c) deprived the Court of jurisdiction to review the decision of the Tax Court that the taxpayer was not entitled to any relief under the provisions of subsection (b) (2) or subsection (b) (4).[3]

2. In deciding the case, the Court, by its opinion (by District Judge Jertberg), in observance of the prohibition of Section 732 (c) has declined to review the decision of the Tax Court on the issue under Section 722 (b) (2). On the issue under Section 722 (b) (4), however, the Court has in fact entertained the petition for review, *reviewed* the matter and "remanded to the Tax Court for further consideration of

[3] The Commissioner conceded that this Court could review the further question presented here by the taxpayer as to whether it had been accorded a review by the Special Division of the Tax Court in keeping with Section 732 (d). The Court, in its opinion, has ruled on that matter, deciding it against the taxpayer, and we do not of course quarrel with that.

the relief sought by petitioner under Section 722 (b) (4)." (Op. 10.)

3. The action of the Court in *reviewing* as to the issue under Section 722 (b) (4) is plainly and inherently inconsistent with its action on the issue under Section 722 (b) (2).

On the issue under subsection (b) (2), the Court recognized, as indicated, the prohibition of Section 732 (c) against appellate review. However, on the issue under subsection (b) (4) the Court fell into error and *reviewed* the decision of the Tax Court—without even stating or attempting to demonstrate why it regarded the decision of the Tax Court as any more reviewable on the subsection (b) (4) issue than on the subsection (b) (2) issue.

An analysis of the opinion of the Court readily demonstrates, we believe, that what the Court has done on the issue under subsection (b) (4) is to *review* the decision of the Tax Court—in violation of Section 732 (c). Clearly, the examining of evidentiary findings of fact, the measuring of ultimate findings against the evidentiary findings, and the analyzing of ultimate findings and of the underlying reasoning relied upon in reaching a decision, constitute nothing more nor less than the exercise of the appellate function. What the Court has done on the subsection (b) (4) issue, in substance and in effect, is the equivalent of what an appellate court would do in the normal Tax Court case subject to appellate review—i. e., in the normal case which is subject to appellate review under the ordinary provisions of the law.

In other words, what the Court has done on the subsection (b) (4) issue is to apply the same tests to the decision of the Tax Court which an appellate court would usually apply in ordinary Tax Court cases which are not covered by the prohibition of Section 732 (c). In so doing, the Court has clearly exceeded the function left to it in Section 722 cases by the provisions of Section 732 (c), we submit. The function of the appellate court in a Section 722 case is, in our opinion, undeniably limited by Section 732 (c) to the ascertaining of whether the question as to which review is sought is one which was determined by the Tax Court "solely by reason of" Section 722. Once the appellate court has determined whether the particular issue is one decided by the Tax Court "solely by reason of" Section 722, its inquiry should come to an end, for clearly it has then fully exhausted its appropriate sphere of inquiry: It has then exhausted its appropriate function under the law. Here, once the Court ascertained that the question under subsection (b) (4) had been determined by the Tax Court "solely by reason of" Section 722—as indeed it had been, undeniably—it should have refrained from examining the matter further.

4. In reviewing the decision of the Tax Court as to the issue under Section 722 (b) (4), the Court, in addition to violating the mandate of Section 732 (c), has ignored the prior holding of the Court (by a panel consisting of Circuit Judges Garrecht, Healy, and Bone) in the case of *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596, certiorari denied, 332 U. S.

767—the first and now the leading case on the subject of the prohibition of appellate review in these so-called "abnormalities" questions under the excess profits tax law of World War II.

A proper observance and application by the Court in the instant case of the rule enunciated earlier in the *Waters* case, we submit, clearly would have required the Court to decline to entertain the petition for review as to the issue under subsection (b) (4), as it did with respect to the issue under subsection (b) (2). In other words, once it appeared that the decision of the Tax Court on the subsection (b) (4) issue had been "solely by reason of" Section 722, the Court—had it observed the rule of the *Waters* case—should have refrained from going further and analyzing the underlying grounds, reasons, or reasoning upon which the Tax Court has based its denial of relief under subsection (b) (4).

The situation before the Court in the instant case with respect to the review sought by the taxpayer on the issue under subsection (b) (4), or the issue under subsection (b) (2), was identical to that before the Court in the *Waters* case. In the *Waters* case, the Tax Court, following its holding in a prior case, had denied relief because of its reliance upon a provision of a regulation on the question of whether certain income could be considered as "abnormal" income attributable to other years within the provisions of Section 721. Before this Court, the taxpayer there had sought review, challenging the underlying reasoning of the Tax Court and the validity of the

regulation as interpreted by the Tax Court. This Court, however, followed and observed the provisions of Section 732 (c) and declined to review the matter, thus refraining from analyzing the underlying reasoning upon which the Tax Court had based its denial of relief, even though the taxpayer had contended that the denial of relief was due to the improper application of an invalid regulation—a question purely of law, and reviewable, it was claimed.

Clearly, in determining whether the matter comes within the prohibition against review contained in Section 732 (c), the underlying reasoning of the Tax Court is immaterial: The controlling factor, by which it must be determined whether the conclusion of the Tax Court is reviewable despite the prohibition of Section 732 (c), is whether the particular issue was decided by the Tax Court "solely by reason of" Section 722—or of one of the other "abnormalities" provisions. This, implicit in the decision of the Court in the earlier *Waters* case, was ignored by the Court in deciding the instant case.

5. Furthermore, the opinion of the Court, in reviewing and remanding to the Tax Court on the issue under Section 722 (b) (4), discloses that the Court has misconceived the fundamental plan of the statute granting relief under Section 722. The Congressional authority for the grant of any relief under Section 722 was conditioned narrowly upon the establishment by the taxpayer of two facts, as plainly set forth in subsection (a) of Section 722: First, the taxpayer must establish that its excess profits tax,

without or before the grant of relief, was "excessive and discriminatory," and second, the taxpayer must establish what would be "a fair and just amount representing normal earnings" to be used in computing its tax upon a "constructive" average base period net income under the law. Further, in subsection (b), Section 722, furnishing its own definition of the term "excessive and discriminatory" tax, enumerated the various situations which Congress felt should be considered as resulting in an "excessive and discriminatory" tax—one of the situations, under subsection (b) (4), being the case of a change in the character of the business during the base period.

Therefore, under the statute, one of the *conditions precedent* to the allowance of any relief under Section 722 is that the taxpayer established that its tax was "excessive and discriminatory." In the instant case, the Tax Court expressly found as a fact (last paragraph of the findings, R. 53) that the "excess profits tax paid by petitioner for the years in issue was not excessive and discriminatory." That finding in and of itself *precluded* the allowance of any relief to the taxpayer under subsection (b) (4)—or under any of the other provisions of subsection (b). Clearly, therefore, after the Tax Court made that finding, if it had said nothing more,[4] but had simply proceeded

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[4] Actually, the Tax Court in this case did go on to discuss the matter and to state, as its final conclusion (last paragraph of its discussion on the Section 722 (b) (4) issue, R. 57):

> We think it is clear that whatever changes took place with respect to petitioner's capacity for production and operation those changes did not bear the proper relationship

to deny relief under subsection (b) (4), its action unquestionably would not be disturbed on review. The fact that the Tax Court (in its separate "opinion", R. 54–57) may have gone beyond that, to explain further, and may have given an inartistic statement of its reasoning—or one not as complete, or as exact, or as desirable as might perhaps have been written—is wholly immaterial for present purposes. The finding by the Tax Court (R. 53) that the tax paid by the taxpayer was not "excessive and discriminatory" in and of itself *sufficed* to dispose of the entire case before the Tax Court, as to the issue under subsection (b) (4) as well as the issue under subsection (b) (2).

6. The Commissioner believes that the matter presented herein is one of extraordinary importance, warranting review by this Court *en banc,* and he believes that review *en banc* is also necessary in order to resolve the conflict with the earlier decision of the Court (by a different panel) in the *Waters* case.

Wherefore, in view of the foregoing, the Commissioner respectfully requests that this, his petition for rehearing, be granted by this Honorable Court, and that the opinion and judgment entered in this cause on August 14, 1956, be vacated and set aside and that a rehearing be granted, and, further, the Commis-

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to its increased earnings to warrant the granting of the relief otherwise authorized by section 722 (b) (4).

That, clearly, was the equivalent of a statement by the Tax Court that it had concluded under the facts that the grant of relief under Section 722 (b) (4) was not warranted.

sioner respectfully suggests that a rehearing *en banc* be granted.

Respectfully submitted.

CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D. C.

SEPTEMBER 1956.

CERTIFICATE OF COUNSEL

The undersigned, attorneys for the Commissioner of Internal Revenue, respondent herein, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D. C.

U. S. GOVERNMENT PRINTING OFFICE: 1956

No. 14809

United States
Court of Appeals
for the Ninth Circuit

MYRTLE HOLLMANN, Appellant,

vs.

CATHERINE BRADY, Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —12-29-55

No. 14809

United States
Court of Appeals
for the Ninth Circuit

MYRTLE HOLLMANN, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Appellant.

McCUTCHEON & NESBETT,

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Attorney for Appellee.

In the District Court for the Territory of Alaska,
Third Division

No. A-7523

CATHERINE BRADY, Plaintiff,

vs.

MYRTLE HOLLMANN, Defendant.

COMPLAINT

The plaintiff complains of the defendant and for cause of action alleges:

I.

That on or about the 24th day of November, in the City of Anchorage, Third Division, Territory of Alaska, at that place known as the Pioneer Apartments, the defendant in a certain discourse and in the presence and hearing of diverse persons, maliciously spoke and published of and concerning plaintiff the false and malicious words following, to-wit: "You're not so smart (meaning the husband of the plaintiff, Charles Brady), you're married to an ex-whore (meaning the plaintiff) from Butte, Montana. I know all about it; she (meaning the plaintiff) worked with another whore called June", and other words of the same defamatory nature.

II.

That by reason of the said defamatory words, the plaintiff has been greatly injured in her good name and character, the plaintiff's health and well being has been impaired, and that said words have caused

serious and frequent marital disturbances, all to her damage in the sum of Fifty Thousand Dollars ($50,000.00).

Wherefore the plaintiff prays judgment in the sum of $50,000.00, costs of this suit, attorney fees, and all other relief that may be just and equitable.

McCUTCHEON & NESBETT,

/s/ By JOHN L. RADEN,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed February 6, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and for her answer to the complaint filed by the plaintiff, admits and denies as follows:

I.

The defendant answering denies each and every allegation set forth in Paragraph I.

II.

Answering Paragraph II, the defendant denies each and every allegation set forth in Paragraph II.

Wherefore, having fully answered the plaintiff's

complaint, defendant moves this Honorable Court to dismiss said complaint with her costs.

/s/ HAROLD J. BUTCHER,
Attorney for the Defendant

Duly Verified.

[Endorsed]: Filed March 19, 1952.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTIONS TO THE JURY

Instruction No. 1

A slander which consists of directly or indirectly charging another with conduct involving unchastity is not actionable in itself unless the misconduct imputed amounts to a criminal offense for which the party may be indicted and punished. Slander, no matter how gross, imputing unchastity to a woman, but which unchastity is not such as could bring about the criminal prosecution of a person against whom the slander was made is not actionable unless coupled with claim and proof of special damages and such slander is known as slander per quod. A slander which consists of directly or indirectly charging another with a crime for which the person could be indicted and punished is what is known as slander per se, which means slander in and of itself without proof of any actual damage.

Instruction No. 2

The words alleged to be spoken by the defendant, if the defendant spoke them, are not in themselves slanderous or defamatory. Slanderous or defamatory words, if spoken, must accuse plaintiff with the commission of a crime for which she could be charged and punished.

Pollard vs. Lion, 91 U.S. 225, pages 228 and 230.

Instruction No. 3

The words "you are married to an ex whore from Butte, Montana", do not impute a present crime or a specific crime for which, under the laws of the Territory of Alaska, the plaintiff could be charged, but at best, only impute that the plaintiff was an ex-whore from Butte, Montana. The plaintiff could not be indicted or punished with a criminal offense, under the laws of the Territory of Alaska, even if the plaintiff was an ex-whore from Butte, Montana. Therefore, the words, if you believe they were spoken, must be coupled with proof of special damages. Where the words are not in themselves actionable because the offense imputed will not subject the offender to criminal punishment, special damage must be alleged and proved in order to maintain the action.

Pollard vs. Lion, 91 U.S. 225, pages 234, 236 and 237.

* * * * *

[Endorsed]: Filed February 2, 1955.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

Numbers 1-14 inclusive and 5-A

* * * * *

Instruction No. 3

You are instructed that the utterance or publication of a false statement imputing unchastity or the commission of a crime such as prostitution is defamatory and slanderous in itself.

Truth, however, is a complete defense, but in this case no attempt has been made to prove the truth of the statement allegedly made, and therefore if you find that it was made as alleged its falsity is presumed and the defendant is liable in damages to the plaintiff in some amount unless the statement was privileged, as I shall hereinafter instruct you.

* * * * *

Instruction No. 6

If you find from a preponderance of the evidence that at or about the time and place stated the defendant made the statement as alleged in the complaint, or in substantially those terms, you should find a verdict in favor of the plaintiff for some sum between $1 and $50,000 as damages. But if you do not so find, or find that the statement was privileged, your verdict should be for the defendant.

If you find that the plaintiff is entitled to recover damages, then you may take into consideration the

social rank, standing, and position of the plaintiff; the injury, if any, to her reputation; the mental suffering, mortification and humiliation which she may have endured by reason of the publication of the statement referred to; and the injury, if any, to her health, marriage or marital relationship, and award her such amount as you think will fairly compensate her.

* * * * *

[Endorsed]: Filed February 2, 1955.

[Title of District Court and Cause.]

VERDICT NUMBER ONE

We, the jury, duly impanelled and sworn to try the above entitled cause, find for the plaintiff and assess her damages in the sum of $1,500.00.

Dated at Anchorage, Alaska, this 2nd day of February, 1955.

/s/ ROBERT W. HAYES,
Foreman

[Endorsed]: Filed February 2, 1955.

In the District Court for the District of Alaska, Third Division

No. A-7523

CATHERINE BRADY, Plaintiff,

vs.

MYRTLE HOLLMAN, Defendant.

JUDGMENT

The above entitled action came on for trial commencing January 31, 1955, the trial ending on the second day of February, 1955, before the above Court, the Honorable George W. Folta sitting as District Judge, the plaintiff being present in person and represented by McCutcheon & Nesbett, her attorneys, and the defendant being present in Court and represented by Harold Butcher, Esq., her attorney; a jury of twelve persons was regularly impaneled and sworn to try the cause and oral testimony having been introduced and admitted on behalf of both parties, whereupon the Court instructed the jury on the law in the matter and both counsel having argued the matter to the jury, the jury thereupon retired to consider their verdict. Thereupon at 5:00 o'clock p.m. on the 2nd day of February, 1955, the jury returned in to Court with a verdict which was unsealed in open Court and in the presence of the jury and found to be a verdict in favor of the plaintiff reading as follows:

"Verdict No. 1. We, the jury, duly impaneled and sworn to try the above entitled cause, find

for the plaintiff and assess her damages in the sum of $1500.00.

Dated at Anchorage, Alaska, this 2nd day of February, 1955.

/s/ Robert W. Hayes, Foreman"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is hereby

Ordered, Adjudged and Decreed that judgment be and is hereby given in favor of the plaintiff, Catherine Brady, in the sum of $1500.00 and that plaintiff shall have and recover from the defendant, plaintiff's costs and disbursements in this action incurred, to be taxed by the Clerk of the Court in the manner provided by law, and an attorney's fee in the sum of $325.00.

Dated at Anchorage, Alaska, this 9th day of February, 1955.

/s/ GEORGE W. FOLTA,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed February 9, 1955.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant above named and moves this Honorable Court to grant a new trial in the above entitled cause and for grounds for said motion states:

1. That the Court erred in instructing the jury that, "The utterance or publication of a false statement imputing unchastity or the commission of a crime such as prostitution is defamatory and slanderous in itself."

2. That the Court erred in giving instruction No. 6, for the reason that it is an incorrect statement of the law of damages resulting from a slanderous utterance which was not slanderous per se.

3. That the Court erred in permitting the case to go to the jury when there was no evidence produced by the plaintiff that the injuries of the plaintiff were the direct or proximate result of the slanderous utterance.

4. That the Court erred in denying defendant's motion for judgment in favor of the defendant when the plaintiff rested her case.

5. The Court erred at the commencement of the trial when it denied defendant's objection to the jury on the ground that it was not drawn from the panel of petit jurors in accordance with law.

The defendant moves this Honorable Court to set aside the judgment rendered and grant a new trial for all of the reasons above stated.

Dated at Anchorage, Alaska, this 14th day of February, 1955.

/s/ HAROLD J. BUTCHER,
Attorney for the Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Buell Nesbett, Attorney at Law, and Catherine Brady, Plaintiff:

Notice Is Hereby Given, that the defendant herein, Myrtle Hollman, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Judgment granting to Catherine Brady, the plaintiff, the sum of $1,500.00 together with attorney fees and costs; which judgment was filed of record on the 9th day of February, 1955, and defendant's Motion for New Trial having subsequently been denied on the 29th day of March, 1955.

Dated at Anchorage, Alaska, this 20th day of April, 1955.

/s/ HAROLD J. BUTCHER,
Attorney for the Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 20, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, the provisions of Rule

75 (g) (o) of the Federal Rules of Civil Procedure, and the designation of counsel for Appellant, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, together with the court reporter's transcript of all of the testimony taken at the trial of the cause.

The papers transmitted herewith are described as follows:

1. Complaint of the plaintiff.
2. Answer of the defendant.
3. Defendant's proposed instructions to the jury, (1 to 6).
4. Court's instructions to the jury. Exceptions to instructions in transcript of testimony, pp. 228 to 230, incl.
5. Verdict.
6. Judgment.
7. Motion for new trial.
8. Court's minute order of March 28, 1955 denying motion for a new trial.
9. Notice of appeal.
10. Order extending time to docket record on appeal.
11. Appellant's designation.
12. Reporter's transcript of testimony.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled action by the above entitled court on February 9, 1955, to the United

States Court of Appeals at San Francisco, California.

Dated at Anchorage, Alaska, this first day of July 1955.

[Seal] /s/ WM. A. HILTON,
Clerk of the United States District Court, Third Division, Alaska.

In the District Court for the District of Alaska, Third Division

No. A-7523

CATHERINE BRADY, Plaintiff,

vs.

MYRTLE HOLLMANN, Defendant.

TRANSCRIPT OF PROCEEDINGS

Anchorage Alaska, January 31, 1955, 10:00 a.m.

Before: The Honorable George W. Folta, U. S. District Judge.

Appearances: For the Plaintiff: Buell A. Nesbett, Attorney at Law, 315 4th Avenue, Anchorage, Alaska. For the Defendant: Harold J. Butcher, Attorney at Law, Gottstein Building, Anchorage, Alaska. [1*]

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors and counsel for both plaintiff and defendant examined and exercised their challenges against said jurors, until the jury of twelve jurors was complete. Thereafter, the following proceedings were had:

The Court: Do the parties agree that the case can proceed with less than 12 jurors should it become necessary to excuse any juror during the progress of the trial?

Mr. Butcher: ——

Mr. Nesbett: By reason of illness?

The Court: Yes, or any other reason found sufficient by the Court.

Mr. Nesbett: I will so stipulate.

Mr. Butcher: I will also, your Honor. Your Honor, at this time I would like to raise a point in connection with the jury, information of which came to me during the proceedings this morning. I learned that the panel has been divided. The regular panel called for trial of cases has been divided and [3] half of them have been taken to the Presbyterian Church for use as jurors. Is that your understanding?

The Court: Yes.

Mr. Butcher: And I understand the method by which that division was made was based on taking every other name on the panel rather than by chance, as is the custom in drawing from the panel, so that at least half of the panel we have not had an opportunity by the laws of chance to get by drawing from

the jury box jurors for possible service and I wish the record at this time to record an objection to that procedure and take an exception to that procedure.

The Court: Well, of course, the objection is overruled, but you have your exception without even expressing it. The panel was purposely enlarged in order to take care of two courtrooms so it is inaccurate to say that you have been deprived of the full panel because you wouldn't have had them in the first place if only one court was operating.

Mr. Butcher: I understand in Judge McCarrey's court this morning there was barely enough to compose a quorum for the drawing of the jury.

The Court: So long as it is barely enough, it is enough. 24 is the statutory minimum and he had 26. I think there were 28 or 27 here.

Deputy Clerk: 27.

The Court: So that complies with the statute so far as [4] the minimum is concerned.

Mr. Nesbett: I thought that was what you were doing this morning, your Honor, before the jury was split—by drawing names by chance.

The Court: Certainly they were. The jurors here were drawn by chance, but what counsel has in mind is that he didn't have the benefit of the entire panel here.

Mr. Nesbett: I realize what he has in mind. I thought he took the names of the entire panel, put them in the box, and was split this morning before 10:00 o'clock.

The Court: I don't know about that. I had nothing to do with that. You may swear the jury then.

CHARLES BRADY

called as a witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Nesbett): Your name is Charles Brady? A. Yes, sir.

Q. And are you married to the Plaintiff, Catherine Brady? A. Yes, sir.

Q. When were you married to Catherine Brady?

A. November 1949.

Q. And November 27, was it? A. Yes, sir.

Q. And what business were you engaged in at that time? A. Red Cab business.

Q. And what, if any, interest did you have in that company?

A. I think at that time I had one-quarter interest.

Q. One-quarter interest. Who held the remaining three-quarters interest, Mr. Brady?

A. Orville P. Wally.

Q. And how old are you? A. 33. [6]

Q. How long have you lived in Alaska?

A. Since '41, except for my time in the Army.

Q. How long were you in the Army?

A. 3 years.

Q. Where did you serve in the Army?

A. Part of the time in California and in Europe.

Q. Which Army were you in?

A. Third Army.

Q. General Patton's Army? A. Yes.

Q. Did you receive any decorations?

(Testimony of Charles Brady.)

A. Yes.

Q. In the military service?

Mr. Butcher: Your Honor, I object to going into——

The Court: Objection sustained.

Q. Now, Mr. Brady, getting back to the cab business. Was Catherine Brady, your wife, working for the Red Cab Company in November—November 24, 1951 A. Yes.

Q. And what was her position?

A. Well, she was dispatching and taking care of the books.

Q. All right. And what did you do with respect to Company duties?

A. Well, I drove and I managed the company most of the time.

Q. And, now, as of November 1951 Mrs. Hollmann had an interest in the company, did she not?

A. Yes, she has had one ever since we have had it.

Q. And who else owned an interest in the company? A. Sam Mealey.

Q. Now, drawing your attention to November 24 of 1951, I will ask you whether or not the partners held a meeting with respect to company business? A. Yes, sir, they did.

Q. Where was this meeting held and at what time of the day?

A. It was held at Mrs. Hollmann's place at approximately 3:00 to 4:00 o'clock.

Q. 3:00 or 4:00 o'clock?

(Testimony of Charles Brady.)

A. In the afternoon.

Q. And who was present?

A. Sam Mealey, Myrtle Hollmann and myself.

Q. What was discussed at this meeting, Mr. Brady?

A. We were talking about incorporating.

Q. Go ahead.

A. And they had passed a law at that time that we had to have all company owned cars, so we had to incorporate to get our cars all in the company name.

Q. Now, were you in favor of incorporating or not? A. Yes.

Q. Was Mr. Mealey in favor of incorporating?

A. Yes.

Q. How did Mrs. Hollmann stand on that matter? [8] A. She didn't want to.

Q. Now, how long did this discussion take place?

A. Well, we were there about an hour.

Q. What happened? Did the discussion break up?

A. Well, she got angry. She figured that——

Mr. Butcher: I object to anything she figured, Your Honor, as being beyond the ability of this witness to testify to.

The Court: Well, I don't think I can sustain the objection even though he uses the expression "figured" because I imagine that he uses it in the sense that people often do carelessly to mean that he judges that she did so and so by saying so and so.

(Testimony of Charles Brady.)

Mr. Butcher: He may——

The Court: I don't think he is merely guessing at it.

The Court: He certainly can't say what he believed or what he judges or figured.

The Court: You understand you are not allowed here to guess but when you speak that you figure that somebody wanted to do so and so your testimony must be based on what that person said, not on guessing on what the person had in mind.

A. She had the idea that——

Mr. Butcher: I object to any idea she had, Your Honor. I want the witness to testify to anything she did or said and nothing else. [9]

The Court: All right. I have instructed him if it is a case of judging what her thoughts were he wouldn't be allowed to say what she thought. You can only say what idea somebody had on the basis of what that person said, not on what you guess.

Q. (By Mr. Nesbett): Well, I will put this question. What did Mrs. Hollmann say regarding incorporating, in general?

A. She said that Sam and I was trying to get together to take over the company.

Q. Did she explain what she meant by "take over the company"?

A. Well, that we would operate it without her having anything to say about it.

Q. Well, how did the discussion progress? Did you get anywhere in that respect?

A. No, we did not.

(Testimony of Charles Brady.)

Q. What happened?

A. She got angry and there were a few words said back and forth and she said, "You are not so smart"—she said, "You have got a whore for an ex-wife."

Q. You mean ex-whore for a wife?

A. Yes.

Q. What else did she say in that connection?

A. Well, she said that she was supposed to be from Butte, Montana, and she worked with a girl by the name of June.

Q. Did she say that to you when she was angry at you? [10] A. Yes.

Q. And what did you say, if anything?

A. I said, "What did you say," and she said it again only not quite so mad.

Q. Pardon me.

A. And we left right after that.

Q. What do you mean?

A. I and Sam Mealey.

Q. Was Sam Mealey standing there so he could hear that remark too? A. Yes.

Q. Mr. Brady, you had been married to Catherine Brady, according to the testimony, then almost 2 years at that time, hadn't you?

A. That is right.

Q. This incident that you have testified to occurred, I believe you said, on November 24, did it not? A. Yes, sir.

Q. Your wedding anniversary was to have been November 27? A. Yes.

(Testimony of Charles Brady.)

Q. Well, now after you and Sam Mealey left what did you do?

A. Well, I and Sam went out to the Stage Coach and had a cup of coffee and talked about it a little more there and then I went home.

Q. What did you do when you got home? [11]

A. Well, I didn't do anything right away. I didn't know just what to do. I was still kind of—I didn't know whether to tell her. I knew there would be some argument if I told her, but I did. I was home about half an hour and I told her about —I asked her if she had ever been to Butte, Montana, and she said no, so I asked her a couple of times if she had been to Butte, Montana, and she still said no and she asked me what was the matter so I told her.

Q. What did you tell her?

A. I told her what Mrs. Hollmann had told me and I asked her if it was right and she said, "No, it wasn't."

Q. Did any other conversation take place between you regarding——

Mr. Butcher: I object to any conversations that took place between Mr. Brady and his wife not in the presence of the defendant, Your Honor.

The Court: Objection sustained.

Q. (By Mr. Nesbett): What was done then? What else was done between you and your wife?

A. Well, nothing right then.

Q. Did she do anything?

A. Oh, she was crying.

(Testimony of Charles Brady.)

Q. Did you stay at home for dinner that evening? A. Yes.

Q. Did you stay at home all the rest of the evening? [12] A. No.

Q. What did you do then?

A. I went out and had a few drinks.

Q. What time did you get back home?

A. Sometime late morning.

Q. Late or early? What time was it, roughly?

A. About 6:00 or 7:00 o'clock in the morning.

Q. What happened then?

A. Well, I went to bed.

Q. Was your wife waiting for you when you came home? A. Yes, she was up.

Q. Did anything of unusual nature happen?

A. Oh, we had a little argument then.

Q. Did you call her any names?

Mr. Butcher: I object to any names he might have called her.

The Court: I didn't hear the question.

Mr. Nesbett: I asked if he called her any names.

The Court: This doesn't seem to be connected with the allegations of the complaint. The objection will have to be sustained.

Mr. Nesbett: Your Honor, now here is the point in this thing: We are going to have to show that this lady suffered, was damaged, and if I can't introduce evidence of this kind—why shouldn't I be permitted to if that is what happened? Let [13] the jurors decide.

The Court: Well, I am inclined to think that

(Testimony of Charles Brady.)

you would be limited to showing there was marital discord or worse, if that happened to be the fact, but not particularly what was said.

Mr. Nesbett: I didn't say that, Your Honor. He can answer it yes or no. I asked "did you call her any names" and he could say yes or no.

Mr. Butcher: I am going to object to that on the same grounds, Your Honor. If he called her any names he is saying so. Now, that would be self-serving and it would be outside the presence of the defendant.

Mr. Nesbett: It would be self-serving if it occurred before the suit was filed, Your Honor.

Mr. Butcher: I think Mr. Nesbett is limited to show any suffering that might have been inflicted upon her by virtue of the statement; not any punishment inflicted upon her by her husband.

The Court: I think the court will have to adhere to the ruling, while you may show what followed in the way of consequences, such as, marital discord, that you may not show it by the words of what was said between them.

Q. (By Mr. Nesbett): Let me ask you this, Mr. Brady. Did an argument occur when you came home that morning? A. Yes, sir. [14]

Q. And what was the cause of that argument?

A. Well, she asked me why I was out drinking.

Q. Well, why had you been out drinking?

A. Well, I just—nothing much else to do, I guess, right then.

(Testimony of Charles Brady.)

Q. I will ask you whether or not this matter was preying on your mind?

A. Well, it was, yes.

Mr. Butcher: Your Honor, we are not here to show this man was suffering. We are here to show his wife was suffering and his suffering has got nothing to do with this case. He is not suing for his suffering.

Mr. Nesbett: Your Honor, if it affects this man's conduct and caused him to do the things that I am going to show he did, she suffered. He is just an instrument of proving the case, as far as I am concerned.

The Court: That is true, except he has already answered he doesn't know why he stayed out all night, so on the basis of that answer the objection would seem to be well taken.

Mr. Nesbett: I will ask him a further question then.

Q. Did you in this argument discuss the statement that Mrs. Hollmann is supposed to have made to you the evening previously?

Mr. Butcher: I will have to object on the ground it is leading, Your Honor. This witness must be able to testify in [15] support of the case by his own testimony, not by Mr. Nesbett.

The Court: Yes, you may ask him whether they had trouble or arguments or altercation as a result, but in view of the objection, why, you shouldn't lead him by questions of the kind that would direct

(Testimony of Charles Brady.)

his attention to some particular argument until he shows he is unable to recall it.

Mr. Nesbett: He is a difficult witness. As pointed out he didn't want to come in the case and you can see he is holding back and is reluctant.

Mr. Butcher: I object to that. He is stating exactly what Mr. Nesbett wants him to say.

The Court: I don't believe that on the basis of the present showing he is hostile to the extent to permit you to cross examine. If you can make that showing you can cross examine, but in view of the relation between him and the plaintiff it is almost incredible that there would be hostility.

Mr. Nesbett: I didn't mean to intimate hostility. I said he was a reluctant witness.

The Court: Well, of course, if a witness is reluctant he may be cross examined, but the trouble here is that the claim of reluctance is one that seems very unusual in view of the relationship between them.

Mr. Nesbett: All I have to do is invite Your Honor's attention to his attitude.

The Court: I think you better proceed in examining him [16] as though he were not reluctant, but if it develops that he is then the question may be re-argued.

Mr. Butcher: May I say something, Your Honor. If Your Honor please, this witness is not reluctant. He has been prepared to answer every question and has been stopped only by my objections. He has been prepared every time Mr. Nesbett asked him

(Testimony of Charles Brady.)

questions to answer them and I have been the one that stopped him. I am the one that is reluctant to let him testify because I want him to testify to the facts.

The Court: I have already held I cannot hold he is reluctant at the present time.

Q. (By Mr. Nesbett): Mr. Brady, I will ask you whether or not on this morning, that you returned home after drinking, you abused your wife, Catherine Brady?

A. How do you mean "abused"?

Q. Did you abuse her in any fashion?

A. We had an argument, yes.

Q. Concerning this statement of Mrs. Hollmann?

A. We had an argument concerning the statement that was said the night before.

Q. What else was done, if anything?

A. I don't think anything else was done. There was an argument there and that is—I guess I told her she could leave.

Q. You did, didn't you? [17] A. Yes.

Q. Well, then what did you do?

A. I went to bed.

Q. Did you have any arguments in the weeks that followed over this same matter?

A. Yes, we had arguments off and on.

Q. And it is a fact, isn't it, that those arguments were usually the result of your bringing this subject up——

Mr. Butcher: I object.

(Testimony of Charles Brady.)

Mr. Nesbett: Let me finish the question.

Mr. Butcher: Your question is leading.

Q. After you had been drinking?

The Court: I don't recall now the form of the question. Do you still insist on your objection?

Mr. Butcher: I would like to have it read then I can pass on it.

(Thereupon, the reporter read Question Line 7 above.)

Mr. Butcher: I will withdraw my objection.

Q. (By Mr. Nesbett): Now, were they?

A. Yes.

Q. And concerning this same statement that Mrs. Hollmann made to you? A. Yes.

Q. Mr. Brady, going back to this meeting that took place in [18] Mrs. Hollmann's home. Was Mr. Carl Hollmann there at that meeting?

A. Yes, he came in right after that was said.

Q. After Mrs. Hollmann made the remark to you about your wife? A. Yes.

Q. And did you tell him what Mrs. Hollmann had said?

A. Yes, he was told what was said. I don't remember if I told him or not, but he was told.

Q. Did he have anything to say?

Mr. Butcher: Who are you talking about?

Mr. Nesbett: Carl Hollmann.

Mr. Butcher: Carl Hollmann is not a party to this action.

Mr. Nesbett: Mrs. Hollmann is.

Mr. Butcher: Whatever he said is——

(Testimony of Charles Brady.)

The Court: That is true. I don't remember, however, what the last question was. Will you repeat the last question.

(Thereupon, the reporter read Question Line 9 above.)

The Court: Well, of course, that can be answered yes or no.

Q. (By Mr. Nesbett): And it was in the presence of Mrs. Hollmann, wasn't it?

A. What was that again?

Q. Carl Hollmann was told in Mrs. Hollmann's presence, I believe you said, what she told [19] you? A. Yes.

Q. What did Mr. Hollmann say, if anything?

Mr. Butcher: I object, Your Honor, as not being said in the presence of Mrs. Hollmann.

The Court: He just indicated and so has the witness that the defendant was present.

Mr. Butcher: I didn't understand that.

Mr. Nesbett: I went back to the meeting in Mrs. Hollmann's home on November 24.

Mr. Butcher: And was Mr. Hollmann present. Is that your question?

Mr. Nesbett: The defendant was, Mr. Butcher. He came in after the meeting had practically broken up and was told what Mrs. Hollman had told Mr. Brady, and this occurred in her presence.

Mr. Butcher: I withdraw any objection I had.

Q. (By Mr. Nesbett): What, if anything, was said by Mr. Hollmann?

(Testimony of Charles Brady.)

A. He said, "You shouldn't have said that," or something to that effect.

Q. Did Mrs. Hollmann make any reply?

A. She said she could prove it.

Q. Was any other discussion had concerning her statement?

A. No, I think that was about it for the night—for that night. [20]

Q. Then you went on home and asked your wife about it, is that correct? A. Yes.

The Court: We will recess at this time. Ladies and gentlemen of the jury, I think you have heard, either in connection with previous cases, but particularly in connection with this case the admonition given to the jury just before noon about talking concerning the case. I wish you would bear that admonition in mind at all times. The court will recess for 10 minutes.

(Whereupon, at 3:16 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had:)

The Court: You may proceed.

Mr. Nesbett: Did Your Honor rule that I couldn't ask Mr. Brady whether or not he abused his wife verbally the morning——

The Court: No, I didn't rule. I said you can show anything of that kind, but not by having him repeat the exact words that were said.

Mr. Nesbett: Yes, sir.

Q. (By Mr. Nesbett): I will ask you whether

(Testimony of Charles Brady.)

or not you did abuse your wife on the morning after the day that you heard this statement?

Mr. Butcher: I object, Your Honor, on the ground he did put that question to him and he answered it.

Mr. Nesbett: I don't recall it. [21]

The Court: Yes, he did. He answered it, I am sure. He might have used the word abused. He indicated some uncertainty as to its mention, but he answered the question yes. You did ask him.

Mr. Nesbett: There was an objection made and your ruling is he can't answer it, Your Honor?

The Court: That is the objection, yes, and the court——

Mr. Nesbett: What was the answer?

The Court: You will have to ask the reporter.

Q. (Mr. Nesbett): All right. Did anything else happen on that morning, Mr. Brady?

A. Well, I told her she could leave.

Mr. Butcher: He told that, Your Honor. This is repetitious and not proper at this time.

The Court: Yes, he has already said that.

Q. All right. Mr. Brady, I will ask you whether or not any other arguments of family difficulties arose during the following weeks and months in connection with this statement of Mrs. Hollmann?

A. Yes, there were arguments from then on.

Q. And what was the general nature and outcome of those arguments?

A. Well, there were always arguments—you

(Testimony of Charles Brady.)

would call them—and usually happened when I was drinking. [22]

Q. And with respect to your drinking habits. After this statement was made did they increase?

Mr. Butcher: Your Honor, whatever this man's habits and however they changed as a result of this has nothing to do with the issues of this case and I object to any such testimony.

The Court: I think in view of the objection of counsel that the question is leading. That the way he should go about it is to ask him what effect this had on him and let him tell. He ought to know whether he increased his drinking and things of that kind as a result of it.

Mr. Nesbett: Your Honor, he is the kind of witness that will give you one short sentence for an answer and I have to keep probing. All right, I will ask that question.

Q. What effect, if any, did this statement of Mrs. Hollmann's have upon your marriage after November 24? Tell us without quoting exact words which might have passed between you and your wife. Tell us the effect.

A. Well, I went out drinking more than I used to and usually every time after I had been drinking we had an argument. That is usually the time I got to thinking about it the most, I guess.

Q. Let me ask you, did you believe that statement Mrs. Hollmann made to you?

A. Well, I didn't know whether to believe it or

(Testimony of Charles Brady.)

not. I had known my wife about 4 months before I got married. [23]

Q. Now, you had been married 2 years, hadn't you, at the time the statement was made to you?

A. Yes.

Q. Was that a happy 2 years? A. Yes.

Q. And do you know whether or not these arguments that resulted had any effect on your wife's health?

A. Yes, she got nervous and left me in 3 months.

Q. Was she placed under a doctor's care before she left you? A. She was.

Q. Which doctor was she going to?

A. I don't remember what doctor it was.

Q. Do you know what general treatments, in general?

A. She was getting pills for being nervous. Then she had trouble with her heart.

Q. Did she have a heart attack? A. Yes.

Q. Do you know when that occurred?

A. I don't remember offhand.

Q. Did it occur after these arguments commenced?

A. Yes, it occurred just before she went Outside, not long before she went Outside.

Q. Now, did you ever talk with the defendant, Myrtle Hollmann, at any later time about this statement she made to you at the meeting? [24]

A. Well, not very much. There was one time, I think, over at the house.

Q. Which house? Her house?

(Testimony of Charles Brady.)

A. Myrtle's house. We had another argument. It wasn't too much, but she called me a crook that time, and I think Carl was there at the time and he said she shouldn't say that or something to that effect and I said, "Well, it doesn't make any difference. She has talked about Katy too," so she said, "Yes, and I can back it up too."

Q. Did Carl say anything? A. No.

Q. Well, Mr. Brady, however, between November 24, the date she made the statement to you and the date that Mrs. Brady left you did you talk with Myrtle Hollmann about the statement?

A. Well, I don't know if it was just before Katy left or right after she left, but it was right about that time.

Q. Where did that conversation with the defendant take place?

A. That was the same one I just got through talking about.

Q. Well, did you discuss the thing with her at any other time, the statement I mean?

A. Well, I think there was something said, but I can't remember right offhand what it was. It was never through an argument. It was just talking.

Q. I will ask you whether you did discuss it with her at any other time other than the 2 times you have mentioned? [25]

A. No, not that I know of.

Q. Did your wife, Catherine Brady, tell you she was going to commence a suit against Mrs. Hollmann?

(Testimony of Charles Brady.)

A. She said, yes, she was going to sue, but I didn't want her to.

Q. Don't quote her word for word.

Mr. Butcher: I object to the question. The evidence speaks for itself. The pleadings speak for themselves. She did in fact file a suit and that is the best evidence. Whatever she said to him or he said to her about filing the suit has nothing to do with the issues of this case.

The Court: Objection sustained.

Q. (By Mr. Nesbett): Did you know she was going to file a suit? A. No.

Q. Now, actually Mrs. Hollmann was your mother-in-law at one time, was she not?

A. Yes, sir.

Q. You had married her daughter some years ago? A. Yes, sir.

Q. And you have one child by that marriage, didn't you? A. Yes.

Q. And then you divorced your first wife?

A. Yes.

Q. You had occasion to see Mrs. Hollmann frequently, didn't you? [26]

A. When I came out of the Army we went into partnership, yes.

Q. And she worked out of the cab stand as dispatcher, did she not? A. Yes.

Q. How did you get along with the defendant, Mrs. Hollmann? A. Fine.

Q. After you went into business did you have frequent arguments?

(Testimony of Charles Brady.)

A. No, we never had no arguments until, I think, about the time that I got married.

Q. When you married Catherine Brady?

A. Yes.

Q. Well, do you know why the arguments with Mrs. Hollmann commenced after your remarriage to Mrs. Brady?

Mr. Butcher: I am going to object to arguments that have nothing to do with this case.

The Court: Yes, unless——

Mr. Nesbett: Well, the arguments I am talking about, Your Honor, are arguments after his marriage to Mrs. Brady and bear upon the relation between Mr. Brady and Mrs. Hollmann.

The Court: Well, undoubtedly it may show something of their relationship, but how could that be relevant here? That is what isn't clear to me.

Mr. Nesbett: Well, I propose to show that after he had divorced Mrs. Hollmann's daughter and married Mrs. Brady, Mrs. Hollmann's attitude toward Mr. Brady changed and there was [27] malice in her heart against Catherine Brady.

The Court: Well, if she had made these slanderous remarks as alleged against him instead of against his wife, why, the relationship between the two of them would be pertinent, but I can't see, without more, how the relationship would be relevant in the trial of this case.

Mr. Nesbett: I still insist, Your Honor, that if the relationship between Charles Brady, her former son-in-law, and herself had deteriorated after his

(Testimony of Charles Brady.)
marriage to Catherine by reason of that marriage there would be some basis for malice, for her having made the remark to him that she did.

The Court: You mean if their relations had deteriorated she would take advantage of occasions such as this to say something slanderous about his wife. Is that your position?

Mr. Nesbett: Yes, sir.

The Court: I don't know that that is entirely logical. It doesn't necessarily follow that because a person has some ill feeling towards another one that he would, therefore, utter some slanderous remarks about a third person.

Mr. Nesbett: Of course, the third person is his wife. It may not necessarily follow, but the jury could at least consider it with any other evidence and draw their own conclusions.

The Court: But, on the other hand, as I see it, malice is not an element here.

Mr. Nesbett: Well, it certainly would go to damages, I [28] would consider, Your Honor.

Mr. Butcher: If your honor please, this question has been asked generally how he got along with Mrs. Hollmann and his answer was "fine." I think he answered the question. Special arguments have nothing to do with the case.

Mr. Nesbett: The record will show he got along fine until he married Catherine.

The Court: I don't know to what period he was referring when he said he got along fine with her, so I am unable to pass on that objection with-

(Testimony of Charles Brady.)

out checking the notes, if it is that important. But what is the question now? Is there any question?

Mr. Nesbett: I will put that question, how did you get along with Mrs. Hollmann.

Mr. Butcher: I will withdraw my objection.

The Court: But at what time, for what period.

Mr. Nesbett: I was trying to repeat it the way it actually happened. He said, "Fine until he married Catherine."

Mr. Butcher: He didn't say that. He said fine until the arguments over the business, not until he married Catherine. He didn't say that. I stand on the record.

The Court: Well, I don't recall. Do you insist that the answer was different from what counsel says it was?

Mr. Nesbett: Yes, Your Honor. Well, let me put this question—he says he withdraws his objection to this line of questioning. [29]

Q. (By Mr. Nesbett): After you married Catherine was there any change in your relationship with Mrs. Hollmann?

A. Yes, there was a change. It didn't come all at once. We just seemed to get farther and farther apart and started working against each other, more or less, I guess.

Q. Well, now when did your wife, Catherine, leave you?

A. It was about the first of March.

Q. Did you know she was going to leave?

A. No, I didn't.

(Testimony of Charles Brady.)

Q. Did you observe the condition of her health during the period December, January, February until she left?

A. Well, I knew she wasn't feeling too good. She was nervous.

Q. Do you know whether or not she last any weight? A. Yes, she lost some weight.

Q. Now, at the time Mrs. Hollmann made this statement to you on November 24 did she call you to one side of the room and——

Mr. Butcher: I object to——

Q. ——and tell you in a confidential tone of voice——

Mr. Butcher: I object as leading. It might be in the nature of rebuttal, but it hasn't been testified to by Mrs. Hollmann.

The Court: If it is a question concerning the defendant's version of this, as disclosed in the opening statement, why, it is anticipating the defense. I don't think you have to rebut any [30] defense.

Mr. Nesbett: All right.

Q. (By Mr. Nesbett): Sam Mealey was present, was he not? A. Yes.

Mr. Butcher: That has been asked and answered, Your Honor.

Q. Now, how long did your wife stay away?

A. Just about 3 months.

Q. And when did she come back, the month?

A. Well, it was towards the end of May.

Q. Of 1952? A. 1952.

Q. Did you go back together? A. Yes.

(Testimony of Charles Brady.)

Q. And do you know why she came back?

A. Well, I called her up and asked her if she wanted to come back.

Q. And have you been getting along all right since she got back?

A. We still have our arguments. It is brought up every once in awhile.

Q. What is brought up?

A. Oh, about her being called a whore.

Q. Where are you living now, Mr. Brady?

A. Kenai. [31]

Q. And your wife is living there, is she?

A. Yes.

Mr. Nesbett: I believe that is all.

CHARLES BRADY

testifies as follows on

Cross Examination

Q. (By Mr. Butcher): Mr. Brady, you wouldn't have the jury believe that you started drinking after this statement was made and you didn't drink before that time?

A. No, I have always drank a certain amount. but I did drink more after that.

Q. You have always drank pretty heavily. haven't you?

A. I drank heavily when I came out of the Army. I drank heavy until I was married, fairly heavy.

(Testimony of Charles Brady.)

Q. Your first marriage or your second marriage? A. Second marriage.

Q. You drank heavy during all the period of your first marriage?

A. Quite a bit of it, yes.

Q. And you drank heavily up to and including the time of your second marriage. Is that what your testimony is? A. Yes.

Q. And then would you have us believe that you stopped drinking?

A. I didn't stop drinking. I didn't drink very much. [32]

Q. But you drink a little every day?

A. I wouldn't say every day, no.

Q. Most days?

A. I might have drank every day and lots of time I went a week without a drink.

Q. Did your second wife, Mrs. Brady, have any objection to your drinking? A. No.

Q. Did you ever quarrel over your drinking?

A. No.

Q. After you married Mrs. Brady and during the period when she went Outside to receive medical treatment isn't it a fact she went to the hospital and had an operation for cancer?

A. That who went to the hospital?

Q. Mrs. Brady, your wife? A. No.

Q. That is not true?

A. That is not true.

Q. Isn't it a fact she went to the hospital and had her breast removed?

(Testimony of Charles Brady.)

A. That is not true, not at that time.

Q. When was it?

A. That was—well, at the time she had her breast removed her father was awfully sick and she went out to——

The Court: He is just asking you when it was. You [33] don't have to state the exact date, but state it as near as you remember.

A. Well, I am not sure when it was. I think it was in '50 right after we were married.

Q. It was at least after you were married, is that not correct? A. Yes.

Q. She had to go out for a period of time for medical treatment, is that correct? A. Yes.

Q. And that from the time you were married until you had this argument with Mrs. Hollmann there was a period in which you believe she was absent for a period of several months, is that correct?

A. Well, she was—I think she was gone about 6 weeks.

Q. And on that occasion she had an operation for cancer? A. Yes.

Q. And was she quite ill?

A. Well, she was ill when she went out and awfully weak when she came back. She just got permission to get on the plane and come back.

Q. Are you certain she made 2 trips out and stayed several weeks on each occasion?

A. Yes.

Q. And can you state positively that the time

(Testimony of Charles Brady.)

she went out for the operation was not the time after November 1951? [34]

A. When she left me in March she did not go out to have an operation.

Q. What did she go out for?

A. She just left me. She went to Oregon and then to California and to Reno. The time when she had her operation she went to New York.

Q. She didn't leave you on that second occasion because she was sick? A. No.

Q. Now, you state that there were times when you believed this statement and at other times when you didn't believe it, is that correct?

A. Well, I really didn't know what to believe.

Q. Well, did you have faith in your wife?

A. Yes, to a certain extent. It makes you start to think.

Q. Was there ever a time when you didn't believe it?

A. I guess—usually when I got to drinking I got to wondering.

Q. That was pretty much?

A. Quite often.

Q. Each time you would get to drinking then you would lose faith in her, is that correct?

A. Yes.

Q. Did you have any occasion to lose faith in her other than this statement?

A. No, I didn't. [35]

Q. When were you married, Mr. Brady?

A. November 1949.

(Testimony of Charles Brady.)

Q. Where were you living at that time?

A. At the Pioneer Apartments.

Q. You had an apartment there?

A. Yes.

Q. Now, isn't it a fact, Mr. Brady, that the reason you didn't have faith in Mrs. Brady is because you had lived with her for 3 months before you married her, in that apartment?

A. I didn't live with her before she——

Q. How long did you live with her?

A. We might have lived together for 6 weeks, but that is not the reason I didn't have faith in her because we had intended to get married anyway.

Q. That didn't have any bearing at all in your lack of faith in her? A. No.

Q. Did you ever think of that when you lost faith in her? A. No.

Q. Now, Mr. Brady, during the period that you were married to your first wife, Mrs. Hollmann's daughter, you got along with Mrs. Hollmann fine?

A. Yes, we got along together.

Q. And even after you and the first Mrs. Brady were separated you still got along with Mrs. Hollmann fine, did you not? [36] A. Yes.

Q. She showed no animosity towards you as a result of your divorcing her daughter, is that correct?

A. Are you talking about Mrs. Hollmann or Mrs. Brady?

Q. Mrs. Hollmann. A. No.

Q. And when you, she and Mr. Mealey went

(Testimony of Charles Brady.)

into the cab business, purchased the Red Cab business, you were then divorced from the first Mrs. Brady, were you not?

A. Yes, I was divorced as soon as I was out of the Army.

Q. And the 3 of you purchased the Red Cab business together, is that correct?

A. I and Orville Wally and Myrtle Wally purchased it.

Q. And the 3 of you were partners at that time?

A. Yes.

Q. And you continued to operate the business up to and including the time you were married, is that correct? A. Yes.

Q. Now, calling your attention to the occasion of this discussion regarding incorporation of the company. You had on several other occasions discussed incorporating, had you not?

A. Yes, it had been talked about since the City had put the ordinance through.

Q. And you eventually were incorporated, were you not? [37] A. Yes.

Q. At what date were you incorporated, if you remember? A. July 1, 1952.

Q. July 1, 1952, approximately 6 to 8 months after this discussion.

A. I believe June 8 was the date of the incorporation.

Q. June 8 and Mrs. Hollmann was one of the incorporators of that incorporation, is that correct?

(Testimony of Charles Brady.)

A. Well, I am not sure if it was her or Carl that had the name on the papers.

Q. But at that time there was friendly relations existing between you, were there not?

A. Well, business relations.

Q. There were business relations?

A. Yes.

Q. And during that period of time your wife was employed as dispatcher, was she not?

A. That is right.

Q. Was she employed as dispatcher and bookkeeper on November 24, 1951; the occasion of this discussion?

A. Well, I don't know as there was a bookkeeper for the Red Cab at that time. She was keeping books at that time for I and Sam Mealey, I believe, and I don't remember if she was dispatching at that time or not.

Q. Did you and Sam Mealey have business independent of the [38] Red Cab Company?

A. All 3 of us were interested more or less. We each had our own cars and I and Sam did have some cars together because we wanted to put them together.

Q. You were in the Red Cab Company, were you not? A. Yes.

Q. Mrs. Hollmann was a partner in that company? A. Yes.

Q. You were all in it together? A. Yes.

Q. And Mrs. Brady, the present Mrs. Brady

(Testimony of Charles Brady.)

was employed taking care of some books for that company?

A. No, she wasn't taking care of the books for the company. There were no books to take care of —yes, there was, for the dispatchers, yes.

Q. And that was November 24 or near about that time of 1951? A. Yes.

Q. And she continued to take care of the books, did she not, and serve as dispatcher?

A. Well, I think from that time on I don't think there was much books kept for the Red Cab because I believe we made all the dispatches.

Q. The books are available, aren't they?

A. I don't know. I don't know where they are.

Q. There were books kept at that time? [39]

A. Not on Red Cab.

Q. Do you mean to say that you kept no books on the Red Cab?

A. We each kept our own individual books.

Q. And the partnership didn't keep books?

A. No.

Q. Not even dispatchers books?

A. No, I paid all the dispatchers myself. It would be in my books.

Q. Did the Red Cab Company file partnership income tax returns?

A. No, we filed our own separate.

Q. There was no partnership income tax returns filed during that period? A. No.

Q. Are you sure of that?

(Testimony of Charles Brady.)

A. There was, but there was no profit—just a partnership return.

Q. The partnership showed no profit, is that correct? A. That is the way it was.

Q. But individually you filed a return, is that correct? A. Yes.

Q. And you showed it as individual profit and not as partnership profit? A. Yes.

Q. Well, now if you didn't keep any books on the Red Cab Company [40] how did you know whether you were losing money or making money?

Mr. Nesbett: Your Honor, I can't see any point in that. That isn't an issue of the case as far as I know.

Mr. Butcher: We are going to show, Your Honor, by producing the books that during all this period of time Mrs. Brady was employed as dispatcher and taking care of the books she was paid for it and that the books will reveal that.

The Court: If the books show that I suggest that maybe that can be stipulated to.

Mr. Butcher: Well, the point is we want to establish that fact during the period of time after this slanderous phrase was supposed to have been uttered when she and Mr. Brady were having trouble and she became ill and we want to show that during that period of time she was continuously employed.

The Court: Well, that may be, but if you can stipulate to it, why, that would be preferable.

Mr. Nesbett: I will stipulate to that.

(Testimony of Charles Brady.)

Mr. Butcher: I am satisfied. I will stipulate to that, yes.

Q. (By Mr. Butcher): Now, calling your attention to the discussion itself, at the time of the meeting, had you and Sam on that date been keeping the profits earned by Red Cab Company to yourselves as individuals and filing returns on it? [41]

A. We kept the profits of the cars that belonged to us, each one of us, the same as Mrs. Hollmann did.

Q. Did you pay over to Mrs. Hollmann any part of the earnings on your one-third of the business?

A. No, I didn't.

Q. Or did Mr. Mealey?

A. No, he didn't.

Q. Or did you account to her for your earnings?

A. No, and she didn't account to us either.

Q. Well, all right. Then you were requesting her to enter into a corporation with you?

A. Yes.

Q. And she began to raise certain questions about the propriety of the corporation as differentiated from the partnership, did she not, in this discussion you had?

A. Yes, that was the general argument.

Q. Was there a discussion about your wife's employment during that discussion? A. Yes.

Q. That was discussed? A. Yes.

Q. Now, did you know a woman by the name of Marie Cox? A. Yes.

Q. Was her name mentioned in this discussion?

(Testimony of Charles Brady.)

A. No, it wasn't. [42]

Q. Isn't it a fact, Mr. Brady, that Mrs. Hollmann said to you, "Charles, Mrs. Cox has seen your wife in here and has told me that she used to be on the line or was a whore in Butte, Montana, and I think you ought to know about it"? Didn't she say words to that effect?

A. No, she didn't put it that way.

Q. Had you been drinking that day?

A. No, I hadn't.

Q. That is one of the days you didn't drink?

A. No. I did later on, but not yet that day.

Q. You did when you went down to the Stage Coach Inn, is that correct?

A. No, I didn't drink when we left the house. I didn't drink until later on in the evening.

Q. In any event you state you hadn't had a drink? A. No.

Q. Now, do you have a distinct recollection of what Mrs. Hollmann told you? A. Yes.

Q. And didn't she in that statement say something about Mrs. Brady's employment in the business? A. No.

Q. Then in what manner did you discuss Mrs. Brady and her employment?

A. I said that Katy was a good dispatcher and there was always [43] arguments on that because Myrtle was as good as she could be, but she was slow on that board and that is when she got mad and told me that my wife was an ex-whore and

(Testimony of Charles Brady.)

when she did she was mad because her eyes were shining.

Q. Did her eyes always shine when she looked at you?

A. They shined a little harder that night.

Q. Did she regard you as a son in a great many ways?

A. I got along good with Myrtle up until I got married.

Q. You got along good with her after you got married, didn't you? A. For awhile.

Q. Isn't it a fact for several years she has taken care of your child?

A. Yes, she has taken care of my child off and on. I would as soon have the child myself if I could get her, but Myrtle has taken care of her.

Q. How many years are you behind in payments for the child? A. How many years?

Q. Yes, how many years would you say offhand you are behind in payments?

A. I might be behind 4 months.

Q. Isn't it a fact you are behind at least 2 years? A. No.

Q. You know that for a fact?

A. I am pretty sure of it. Her mother is in the house here. [44]

Q. We expect to call her. Now, Mr. Brady, when you would go get drunk and then lose your faith in Mrs. Brady then you would come home and give her a bad time and abuse her, is that correct? A. Well, yes, I believe so.

(Testimony of Charles Brady.)

Q. Was anybody else abusing her besides you?

A. No.

Q. Was she abusing herself?

A. Well, I don't—I suppose she was worrying all right, if that could be——

Q. When you would go off and get drunk and stay away all night would it cause her any concern?

A. Well, it probably did.

Q. And would she speak to you about it?

A. How do you mean?

Q. When you would go away and wouldn't come home all night and be drunk wouldn't she say something to you about it? A. Yes.

Q. Wouldn't you have an argument about it?

A. Yes, there were arguments.

Q. She didn't approve of you doing that, did she? A. No, she didn't.

Q. As a matter of fact, you had several nasty arguments over your drinking, did you not?

A. It wasn't all over the drinking. [45]

Q. What else were you doing that she argued——

A. It wasn't me that was doing it. It was just over the drinking, over the statement that was said and over whether she was or not.

Q. You said you had arguments over the statement and you had arguments over drinking. Did you have arguments over anything else?

A. No.

Q. Did you have arguments over your child?

A. No.

(Testimony of Charles Brady.)

Q. Did you have any arguments down in Kenai since you have moved down there?

A. We had some, yes.

Q. Are they over your drinking?

A. Yes.

Q. What else were they over?

A. Over my running around and drinking.

Q. Did you threaten to go down there and shoot her on one occasion? A. No.

Q. You never made a statement to anyone that you were going to do that? A. No, I didn't.

Q. You never made such a statement?

A. No. [46]

Q. Do you know a man by the name of Mr. Barger? A. Mr. Barger?

Q. Yes. A. Yes, I do.

Q. Before I ask you that question, isn't it a fact that you and Mrs. Brady after you—let me go back a step further—isn't it a fact that about 2 weeks after this discussion took place at Mrs. Hollmann's house you went to Mrs. Hollmann and said, "Myrtle, I got drunk and I went up to Palmer and stayed a couple of days and when I came back I was so drunk that I told Katy what was said over at the house about her being a whore." Do you remember having a discussion like that with Mrs. Hollmann? A. No, I don't.

Q. Do you remember going to Palmer and staying 2 days without Katy? A. No.

Q. Do you remember going up there and staying 1 day?

(Testimony of Charles Brady.)

A. No—well, I have been to Palmer 2 or 3 times, but I don't——

Q. Do you remember any discussion with Mrs. Hollman approximately 2 weeks after this incident at the house in which you told her when you were drunk you had forgotten yourself and told Mrs. Brady about this incident? A. No. [47]

Q. Do you recall telling Mrs. Hollmann that?

A. No.

Q. Do you recall telling anyone at all?

A. No. I told her the night that it happened.

Q. Now, isn't it a fact, Mr. Brady, that you and Mrs. Brady discussed this question on several occasions as to how best you might use it to extract money from Mrs. Hollmann? A. No.

Q. Did you ever conspire at any time with Mrs. Brady to extract money from anyone about bringing false charges against them?

A. No, I don't think I have.

Q. Do you know a Mr. Barger? A. Yes.

Q. He sued you on a note? A. Yes.

Q. And did you about the time of that lawsuit, at the time he got the judgment, tell Mr. Hollmann and Mrs. Hollmann that you were going to have Katy go out to a nightclub with Mr. Barger and have her scream and then you were going to appear on the scene and accuse Mr. Barger of making an attack on her? A. No.

Q. Could you have said it?

A. How do you mean, could I have? [48]

(Testimony of Charles Brady.)

Q. Could you have made such a statement to Mr. or Mrs. Hollmann? A. No, I didn't.

Q. Well, could you have said it?

Mr. Nesbett: He has answered the question twice. I can't see the point——

Mr. Butcher: I asked——

Mr. Nesbett: Just a moment—of putting words in the witness' mouth after he has answered the question twice.

Mr. Butcher: I asked him if he said it, Your Honor, then he said "no" and I asked him if he could have said it and he said "I didn't," now I want to know if he could have said it.

The Court: Well, I thought he answered the question whether he could have said it.

Q. (By Mr. Butcher): Now, Mr. Brady, do you deny that you ever said that to anybody?

A. Yes, I do.

Q. Do you deny that you ever discussed it with Mrs. Brady? A. Yes, I do.

Q. And it is your testimony now that you never had a discussion about Mr. Barger and his going to a nightclub with Mrs. Brady?

A. There has never been such a discussion.

Q. During the course of your married life with the second Mrs. Brady has she been pregnant?

A. Yes, she has. [49]

Q. How many times?

A. She has been pregnant about 3 times, I believe.

(Testimony of Charles Brady.)

Q. Did each of those pregnancies result in miscarriage? A. Yes, sir.

Q. During the time of miscarriage she was very ill, was she not? A. She was ill.

Q. For how long a period was she ill?

A. I will say she was ill at one of them. She wasn't ill at all of them. Most of them she didn't hold over about 3 months—one time she held for 3 months.

Q. And on the time she held for 3 months she was very ill? A. Yes.

Q. Now, will you tell us when that was?

A. That I don't remember.

Q. Could it have been in the spring of 1952?

A. I don't know for sure.

Q. Well, all right. Now, Mr. Brady, you state that you were the only one that abused her about this statement and you only did it when you were drunk?

A. Well, it wasn't necessarily all the time when I was drunk. If there was an argument that came up it came up usually.

Q. When you weren't drinking?

A. If I was drinking or not.

Q. But didn't you previously state that it was mostly when you were drinking? [50]

A. Usually when I was drinking.

Q. That you abused her about it? A. Yes.

Q. If you left her alone no one else was abusing her? A. Not that I know of.

Q. So any distress she had, any abuse she re-

(Testimony of Charles Brady.)

ceived was received from you, is that not correct?

A. Yes.

Q. You were responsible for it?

A. Yes, in a way.

Q. And you abused her because you didn't have faith in her and believed the statement to be true?

A. Well, I didn't know whether to believe it or not.

Q. Did you make any effort to find out?

A. Well, I didn't know if it would be a good idea.

Q. Have you always had a sneaking suspicion in the back of your mind it was true?

A. Could have been.

Q. You were afraid if you investigated you would find out it would be true, is that what you are stating?

A. Well, I don't know what to think about it.

Q. Mr. Brady, you have talked this case over a good many times with Mrs. Brady, haven't you, this lawsuit?

A. Yes, we have talked about it.

Q. Do you remember ever talking to me about it? [51]

A. Yes, last spring when I was on jury duty.

Q. And on that occasion did you tell me that Mrs. Brady was just, through this lawsuit, trying to make Mrs. Hollmann sweat a little bit and she was going to dismiss it?

A. No, you asked me if this case was going to go through and I told you it wasn't up to me. I

(Testimony of Charles Brady.)

believe that you and—well, the lawyer with you, were over at the Westward.

Q. Mr. Grigsby?

A. Mr. Grigsby was with you.

Q. Didn't you on that occasion state that your wife wanted to make Mrs. Hollmann sweat a little bit before she dismissed it?

A. No, you might have brought that up. You asked me if this case was going to come into court and I said I didn't know, it wasn't up to me.

Q. You don't remember stating in my presence and in the presence of Mr. Grigsby that she was going to make Mrs. Hollmann sweat a little bit before she dismissed it? A. No.

Q. Could you have made that statement?

A. No, I don't think so.

Q. Do you deny it?

A. I don't remember saying it, no.

Q. Do you deny it?

A. Yes, I will deny it. [52]

Q. Do you deny you made the statement?

A. Yes.

Q. Now, after you state the relation deteriorated between yourself and Mrs. Hollmann isn't it a fact that you, Mrs. Brady, Mr. Hollmann and Mrs. Hollmann often got together and went on fishing trips, had social gatherings together in each others homes and sometimes dropped into cocktail bars and had a drink together?

A. Well, I don't remember ever going fishing and I remember one night we were out drinking.

(Testimony of Charles Brady.)
I believe it was on St. Patrick's Day, but I don't know if that was before or afterwards.

Q. Isn't it a fact that your relations have been so good you exchanged Christmas cards, birthday presents and Christmas presents between you and the Hollmanns since that time?

A. I never have myself. I don't know if my wife has or not.

Q. Well, do you know that she has not?

A. No, I don't.

Q. Would you deny that?

A. No, because I don't know. She sent about 200 out this year.

Q. During all the time after the alleged statement was supposed to have been made isn't it a fact that you and Mrs. Hollmann—or you and Mrs. Brady, when you were together, never have discussed this?

A. No, it wasn't discussed—not when we were all together.

Q. When you were together you were together in friendly [53] spirits and no harsh words were exchanged between you?

A. We more or less had to be as we all worked in the same office.

Q. And Mrs. Hollmann had never at any time tried to cause your wife to be fired or lose her employment? A. No.

Q. And you never heard Mrs. Hollman say anything about your wife, or against her, other than

(Testimony of Charles Brady.)

the statement you alleged she made at the house, is that not correct? A. That is right.

Mr. Butcher: That is all.

CHARLES BRADY

testifies as follows on

Redirect Examination

Q. (By Mr. Nesbett): How did you run that Red Cab Company? By shift, didn't you, Mr. Brady?

A. Yes. Well, there were 3 partners in it and we each were supposed to take care of a shift of dispatching.

Q. What do you mean by taking care of a shift?

A. Well, 8 hours. It was a 24-hour operation.

Q. Take care—you mean each of you would pay one dispatcher wages?

A. Well, Mrs. Hollmann dispatched herself or her husband, [54] Carl, did and Katy dispatched for me all the time and Sam, I think, was hiring another girl.

Q. Well, then Catherine or Katy, the plaintiff, would work one shift and Mrs. Hollmann another one? A. Yes.

Q. They had very little occasion to see each other except on change of shift, would they?

A. That is right.

Q. After this statement was made to you and you informed your wife of it did you have occasion to—the 2 of you, to go to the Hollmanns' socially?

(Testimony of Charles Brady.)

A. I think we have been in the home probably twice since that—maybe more than that since that statement was made. I have been in there more times.

Q. You were over in connection with your daughter, to see your daughter?

A. Yes, I have been there on that and I have been over there on business.

Q. Then is it your testimony that the relationship between Catherine Brady and Mrs. Hollmann has been good ever since that statement was made?

A. Well, it hasn't been good, but they don't get into a fight every time they see each other.

Q. Do they ignore each other as much as possible?

Mr. Butcher: I object to that as leading, Your Honor. [55]

Q. Well, this matter of your making a remark about your wife being a good dispatcher. I am a little confused on that testimony. Did that take place at the meeting on the evening of November 24?

A. I believe that was said the same night, yes.

Q. And tell us again what was said? How it arose?

A. Well, that argument came up pretty often about her being a better dispatcher and, of course, I guess I thought she was and she could handle a faster shift and I am not sure if that was right at the time that this was said or not, the night of the statement, or the evening of the statement.

(Testimony of Charles Brady.)

Q. I understood you to testify in response to Mr. Butcher's question that you made the remark that Catherine was a good dispatcher somehow or other mixed in the conversation and it made Mrs. Hollmann mad?

A. It did make her mad, but the statement that I am talking about, the incorporation. I don't remember for sure what brought—what made her as mad as she did get when I said that.

Mr. Nesbett: That is all.

Mr. Butcher: That is all.

(Thereupon, the witness was excused and left the stand.)

The Court: Recess for 5 minutes.

(Whereupon, at 4:15 o'clock p.m., following a 5-minute recess, court reconvenes, and the following proceedings were had:) [56]

The Court: You may call your next witness.

Mr. Nesbett: Call Catherine Brady, Your Honor.

CATHERINE BRADY

called as a witness for and on behalf of the plaintiff, being the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Nesbett): Is your name Catherine Brady? A. Yes, sir.

Q. And you are the plaintiff here, aren't you?

A. Beg your pardon.

Q. You are the plaintiff in this case?

(Testimony of Catherine Brady.)

A. Yes, I am.

Q. And the *husband* of Charles Brady who just testified? A. Yes, sir.

Q. When did you marry Charles Brady?

A. I married him November 27, 1949.

Q. And I might ask how old are you now?

A. 34.

Q. 34, and were you employed at the Red Cab Company when you married Mr. Brady?

A. No, I wasn't.

Q. Mr. Brady was, however, was he not? [57]

A. Yes, he was.

Q. You later became employed there, did you not? A. Yes, sir.

Q. Now, calling your attention to the evening of November 24, 1951, did your husband come home, to the family home that evening?

A. Yes, he did. He got home about 5:30. I was cooking dinner at the time.

Q. And will you state what happened when he came home?

A. He got home and sat in the livingroom for a little while and kept looking at me. Then finally he asked me to come in and sit in the livingroom, that he had something to ask me. He said, "Have you ever been in Butte, Montana," and I said, "No, I haven't." He said, "Are you sure," and I said, "Yes, I am sure I have never been in Butte, Montana" and I asked him why did he bring that up, so he sat there a minute and he said, "Well, I was told tonight that you were an ex-prostitute from

(Testimony of Catherine Brady.)

Butte, Montana, and that you were supposedly working with a girl named June" and I said, "Who said that," he said, "Myrtle told me" and he also told me it was during an argument in this business situation they had. I asked him if he believed it and he said he didn't know whether to believe it or not. I said, "Well, I have never been a prostitute," and I argued with him over it. I started to cry and he looked at me again and said, "Are you sure" and I [58] said, "Yes, I am sure," so he let it go at that. He didn't say any more, not that evening, although afterwards, why, we hardly spoke.

Q. You will have to speak a little louder, slower and into the microphone, please.

A. After he told what Mrs. Hollmann accused me of and I told him that I had never been a prostitute and I have never been in Butte, Montana, why, then the conversation ceased. I sat there and cried during the dinner time and he took off about 7:00 o'clock and I didn't see him again until the next morning around 7:30.

Q. What happened when he came home?

A. I was sitting up waiting for him to come home and he got out of the cab, came in the house and took one look at me and said, "You dirty whore. Get out of here and stay out. I gave you my good name," that is what he said, although I didn't leave. I slept on the settee that night and he went upstairs to the bedroom and slept.

Q. That morning you slept on the settee?

A. Yes, I did and many mornings after that too.

(Testimony of Catherine Brady.)

Q. You had been married, according to the testimony, almost 2 years at the time this occurred?

A. It was just about 3 or 4 days before my anniversary.

Q. Now had your previous 2 years of married life been a happy life? [59]

A. Yes, sir, it was. It was very happy. We got along beautifully together and he used to drink occasionally. We used to go out and have a cocktail or 2, go out with a group, but he never drank excessively, but maybe once or twice during the whole time excessively and we have always gotten along beautifully before that.

Q. How did you get along after this incident?

A. Well, after I was accused of that, why, then there were arguments all the time. He brooded on it. I could see that he did.

Q. I can't hear you again now.

A. I said he brooded on that constantly and he would drink more than he ever did before this happened and we got into awful fights afterwards and he would come home after his drinking over excessively and started arguments with me.

Q. And the arguments would be over this?

A. It was always over that. One time he came home and he said, "You dirty slut. I don't want you around me. I wouldn't touch you with a 10-foot pole." He said things like that and I went into hysterics. I just couldn't control myself. I couldn't believe that he would believe such a thing.

Q. Didn't you try to reason with him?

(Testimony of Catherine Brady.)

A. I tried to reason and after awhile I gave it up. I couldn't talk to him. After he got over his drunks he would just say leave me alone and in about 2 or 3 days do the same thing [60] over again.

Q. What was your state of health at the time this happened?

A. Well, before this all happened I weighed 135 pounds. I was healthy. There was nothing wrong with me. I have no cancer.

Q. Well, I will ask you when we come to it.

A. And I was very healthy. There was nothing wrong with me. I lost weight. In 3 months I went down to about 116 pounds and that caused the heart attack, mostly from nervousness.

Q. Did you go to a doctor as a result of this condition?

A. Yes, I was under Dr. Davis' care all the while.

Q. What treatment did he prescribe for you?

A. Well, he gave me heart pills to release the tension around the heart so I wouldn't have those heart attacks. I had 2. One was a bad one and he also gave me medicine for my nervousness.

Q. Did you 2 go out 2 or 3 days later on your wedding anniversary?

A. Yes, we did on Wednesday. I was going to cook again as he didn't want to be seen out, but he insisted we go and we decided to go to Thompson's, but in the meantime I was heartsick. We

(Testimony of Catherine Brady.)
had an argument that morning and we went to Thompson's to eat and——

Q. Would you mind not speaking quite so fast.

A. I said we went to Thompson's to have our dinner and I was still wrought up over the whole thing. I couldn't sit and eat. I cried and while we were there Mary Powell, she has [61] been a friend of mine for many years, she was a waitress there, and she said there was something wrong and I took off away from the table and went into the ladies room because I couldn't sit there. I was ready to cry some more and Mary Powell came into the ladies room to talk to me to see what was wrong and I explained the whole situation.

Mr. Butcher: Your Honor, I am going to object to any testimony this witness says about Mrs. Powell or any other person occurring over to Thompson's which is out of the presence of the defendant and is only self-serving. It doesn't make any difference if 50 people were there and talked to her. It wouldn't make any difference as to this case.

Mr. Nesbett: Mrs. Brady just stated what happened, however, Your Honor, I don't think her answer was wrong so far.

The Court: No, it was not objectionable as far as she had gone.

Mr. Butcher: What she is doing, Your Honor, is establishing by somebody else present the fact she was upset and that she explained to this third person who was present that she was upset which is all outside the presence of this defendant, outside

(Testimony of Catherine Brady.)

the presence of the court, and not possible to put this thing to the test of cross examination.

Mr. Nesbett: Your Honor, we don't contend the plaintiff had all the conversation in the presence of Mrs. Hollmann.

Mr. Butcher: Actually it is hearsay as well. [62]

The Court: That is what I was just going to inquire if the basis of your objection was it was hearsay, but the trouble, as I see it, with that objection is that her saying to this woman in Thompson's Cafe how she felt is no more damaging to you than her statement as to how she felt, period. So it seems to me that no particular purpose would be served by excluding that itself. Of course, it is in the nature of hearsay, but, as I see it, it is harmless.

Mr. Butcher: Your Honor, she is by inference showing in the presence of a third person—attempting to give more weight to what she says which is hearsay.

Mr. Nesbett: Well, we intend to bring the third person in—she is in the courtroom now—to show she was upset and suffering. After all, it was the woman's anniversary and a woman thinks a lot of that occasion.

Q. (By Mr. Nesbett): What happened then, Mrs. Brady?

A. Why, I stayed in the restroom for awhile and Mary, that is, Mrs. Powell, walked out and talked to Charles and she said, "What is this I hear——"

Q. Well, now you are quoting the witness di-

(Testimony of Catherine Brady.)

rectly. You must not tell what she said, just tell what happened.

A. Well, I left the restroom. I went back to my table and sat down. By then dinner was served and I was still upset and Mary was standing there. I told her, "What would you think [63] of a husband that——"

Mr. Butcher: Now, Your Honor, I object to that as being self-serving and hearsay.

The Court: Objection sustained.

Q. Well, what happened? Did you have a long pleasant evening?

A. No, we didn't. I didn't even get through my dinner. We left Thompson's shortly afterwards. He insisted on going out to see a floor show. I wanted to go home. I was upset over it, and which I did.

Q. I ask you whether or not any other arguments came up over this statement of Mrs. Hollmann's?

A. Yes, afterwards on several and many occasions. We would sit there and talk and I tried to talk to him and tried to convince him she was not telling the truth and usually that would upset him more. He would brood about it and he would take off and go out to have a few drinks with the boys and come home the next morning and continue with it. He was very abusive with his language. Every time he looked at me he sneered. We were growing further and further apart and there was nothing I could do to fill in that, bring that gap together.

(Testimony of Catherine Brady.)
He believed it. In the meantime I said I was going to have Mrs. Hollmann take—bring that into court —I was going to take that into court, bring that June up to court and make her prove that I was in Butte, Montana, and that I was a prostitute and that is why I went [64] in and instigated this suit.

Q. Did you tell Mr. Brady you were going to file the suit?

A. I told him that I was going to file a suit against her. He said no he would rather I just let it lay, leave things as they are, but I couldn't stand the abusiveness and I decided I was going to bring it to a head so I went in and brought suit against her without his knowledge.

Q. Well, now how long did this go on—these arguments and so on, Mrs. Brady?

A. They went on until I left about the early part of March when I left to go Outside. In fact the morning I left he was out drinking. I knew when he got home again we would have another battle and abusive and I got to the point where I couldn't take any more of it. I was sick mentally; I was sick physically; I was losing weight fast and I decided I was going to go out, but I didn't go out to a doctor. I went out to—just to leave him and to make up my mind and give him a chance to think things over as to what to do—whether to divorce him or keep on living with him or what.

Q. Where did you go when you went Outside—rather, how did you get Outside? Did you have enough money to make the trip?

(Testimony of Catherine Brady.)

A. No, I didn't. I didn't take a dime of his money. In fact, I was putting his tickets together with the different cars he owned and I had all the money there. I had saved $200.00 [65] I was going to get him a watch for his birthday. I used that and before I left for the plane I went over to Mrs. Powell's and borrowed——

Q. Speak louder and slower, please.

A. I went over to Mrs. Powell's and borrowed $80.00 to have enough money to get to Oregon.

Q. Is that the lady you were saying that worked in Thompson's? A. That is Mrs. Powell.

Q. All right. Where did you go when you went Outside?

A. I left and went to my brother's. He lived in Cave Junction, Oregon.

Q. How long did you stay there?

A. I stayed there a little over 2 weeks. I was under a doctor's care there and he was going to leave for the east coast to go home to see the folks, but the doctor didn't think that I should take a car trip across country like that so I decided I would go to Reno. That is where I lived prior to my coming up here. I decided to go to Reno and visit a girl friend down there, which I stayed with until I came back.

Q. Is that—were you living in town or on a ranch?

A. I was living outside of town on a ranch, yes, sir.

Q. How long did you stay in Reno?

(Testimony of Catherine Brady.)

A. I stayed there a little over 2 months.

Q. Now, after leaving Mr. Brady did your physical and mental [66] condition improve?

A. No, it didn't. In fact, it got worse. I just couldn't get ahold of myself. I was just doctoring all the time, but mentally I was sick. He called me about a week before I came back—he called me from Anchorage—he discovered where I was through Mrs. Powell—and he asked me to come—if I was coming home. That was the first telephone call. I told him, no, I decided I wasn't coming home. I didn't feel I was ready to come home. If I did come home I was going to face what I went through in the past and I had decided to stay. So he waited, I guess, about 5 days and he called again and asked me wouldn't I please come home. He said, "Please come home and let's talk this over. Don't do anything rash, just come home and let's talk it over." I told him I didn't feel like coming back again, but then I said, "All right. I will come back and I will talk this thing over with you and see what we are going to do," and he sent me the money to come back.

Q. Now, what were your relations with Mr. Brady after you returned to Anchorage from Reno?

A. Well, the first day I got home—I sent him a telegram from Seattle telling him I was going to be in on the early morning plane and I got in at 6:00 o'clock in the morning. I had nobody to meet me. I called the office and inquired about him. They said he wasn't working. I called the [67] house.

(Testimony of Catherine Brady.)

There was no answer. I went home by limousine. I waited for him about 2 hours and where I was sitting in the chair I could look out the window and a cab stopped. Mr. Brady got out very intoxicated, so I just left my suitcases standing there in the middle of the room. I wasn't going to unpack. I thought the least he could have done, if he was expecting me, was to meet me.

Q. Did you have an argument on that occasion?

A. No, we didn't. We didn't have an argument. In fact, he didn't remember seeing me. Just as he walked in the door he said, "Hi! You back," and walked upstairs and went to bed, and I thought, well, I will wait until he wakes up to talk it over.

Q. How was your married life from that time on, generally?

A. Well, we still don't get along right to this day.

Q. You don't have as many arguments?

A. No, the arguments are less. I did have a bad argument with him in about October of '52 when he again called me vile names and called me a dirty whore and he mentioned again about giving me his good name and with that he grabbed at me and tore my sweater. I was afraid if I didn't stand up to him and just take it that he would strike me. He was that angry, so I just stood there and told him to go ahead and do it again. I said, "Just go ahead and do it again." So he just ripped the rest of my clothes—not all the [68] clothes, but ripped my

(Testimony of Catherine Brady.)

blouse off completely and with that he walked out.

Q. That was October of '52?

A. That was October of '52, yes, sir.

Q. The arguments since have gradually diminished?

A. They have diminished, but the gap has never been closed. We are further apart. In fact, 2 weeks ago I was contemplating a divorce then I was talked out of it. He said to give him another chance, just to wait and see and maybe things will be different. I have waited so long.

Q. Was that decision to file for divorce based on the incident built up?

A. Well, it is. All of our arguments stems from that because we have never gotten along since. We get along for a little while then there is weeks at a time that we hardly speak, and before I left for Outside, why, he would sleep upstairs and I would sleep downstairs on the settee and things like that have gone on down in Kenai also. He would stay in the bedroom and I would sleep on the settee because I——

Q. Mrs. Brady, have you ever been in Butte, Montana?

A. No, sir, I have never been in Butte, Montana.

Q. Have you ever been in Montana?

A. I have been through Montana on the northern route going to Minnesota when we came through from Alaska.

(Testimony of Catherine Brady.)

Q. Where did you spend your early childhood and youth? [69]

A. I was born in New Jersey and left there in the latter part—I guess it was '42.

Q. Did you go to school there?

A. Yes, I did.

Q. What schooling did you take?

A. I had 2 years of high school and took business college.

Q. Did you work around New Jersey before coming to Alaska?

A. Yes, I did. I was a stenographer and a bookkeeper for Wallace and Terrin in New Washington, New Jersey. Prior to that Brecken and Dickenson. That is a big medical firm. They make medical thermometers and syringes.

Q. I can't hear.

A. Brecken and Dickenson, a medical firm in New Hometown.

Q. How long did you work as a stenographer or secretary in New Jersey before coming west?

A. Oh, I would say around 4 years.

Q. Then where did you live? Then which state did you come to?

A. I came to California. I stayed in California for about, I guess, it was about 7 months then I came from there went up to Reno.

Q. Were you married?

A. Beg your pardon?

Q. Were you married then?

A. No, I wasn't married at the time.

(Testimony of Catherine Brady.)

Q. You did subsequently though, get married?

A. In Reno, 1944.

Q. In Reno in 1944? A. Yes.

Q. You divorced that first husband and came to Alaska, is that correct?

A. No. I was married back east. My marriage only lasted a year and I was divorced back in New Jersey and went to California. Then from there I went to Reno and in 1944 I again got married and that lasted until the spring of 1949.

Q. You came to Alaska with that husband, did you not?

A. No, I came here with him in '47. We came up here for a trip. We went back in the fall of '47.

Q. Now, have you ever had a cancer?

A. No, sir, I have never had cancer.

Q. This operation Mr. Brady was trying to explain, can you tell the court and jury what that was all about?

A. Yes. When I left here I didn't leave here sick. I wasn't ill. In fact, I didn't think it was anything to worry about. It didn't bother me. I had gotten a telegram from home stating my dad was quite ill and he was in a coma and didn't know whether he was going to pull through or not. Mom called and said for me to come home. So I left here in September, the early part of September 1950, and went Outside to see my dad. During that time I was telling my [71] mother about a little bump I had and she kind of got worried and talked to a doctor about it. In the meantime, the doctor, he is

(Testimony of Catherine Brady.)

the family physician, asked me to come to the office and have a check-up on it and he thought I should have further examination and sent me to the Memorial Hospital in New York, which is a cancer clinic. I went to New York and had all these tests taken. I found out it wasn't cancer. It was just a slight tumor. I had the tumor removed and a very slight part of the left breast, but I did not have the full breast removed.

Q. Then did you, when you went out in March of '52, go out with the idea of having an operation?

A. No. I went out in March of '52 when I left Mr. Brady. I definitely left him.

Q. Did you have friendly relations with Mrs. Hollmann after this incident, after she made the statement?

A. For a long while if we passed on the street I would turn my head the other way and wouldn't even look at her. That went on for a long time. I was in her house, I believe, twice. Once it was to see Chuck's daughter and another time I was in there when Mrs. Daugherty now—she was Mrs. Daly at the time—was leaving for Outside with her mother, that is, Mrs. Hollmann and left with my husband's daughter.

Q. You were in the house, did you have friendly relations with [72] Mrs. Hollmann while you were there?

A. Just spoke. Not very friendly, no.

Q. How would you handle the situation when you relieved each other on the dispatcher's desk?

(Testimony of Catherine Brady.)

A. She would get up and I would sit down. That went on for the longest while.

Q. Did you talk about things?

A. No, I wouldn't discuss it. I started suit and I wanted her to prove that in court, to bring that June—I thought that was the place to do it. I wouldn't discuss it with her at all. I would only get myself upset more.

Q. You also kept the books for Red Cab—rather, was it Red Cab or Mr. Brady?

A. No, at first about 1950 and early part of '51 I kept books for my husband. At the time when I married him he only had one car on the stand and up until '51 he had gotten six cars of his own, that is, owned completely by him and he also was in partnership with Sam Mealey on five cars. All I did was just keep their accounts, their takes, check their cards every day and take that money to the bank. In 1950 for awhile I didn't.

Q. That was only for Sam Mealey and Mr. Brady that you kept the books?

A. In 1950 I kept—they decided that we should keep a sheet on call cars and what each one made and I kept those, but I [73] wasn't paid for it. I just did that in my spare moments as a favor to them because they thought that should be done, so the boys wouldn't get away with the takes. They would go 2 or 3 days without turning in and when it came time to turn in they didn't have money. They decided in that way we would overcome a lot

(Testimony of Catherine Brady.)
of that and I just kept daily track of their takes and it was turned over to them individually.

Q. All right. About this matter of being pregnant. Were you pregnant 3 times during your marriage to Mr. Brady?

A. Yes. In 1951, September '51 is when I had one miscarriage and that was my first miscarriage and then I had a miscarriage afterwards which wasn't very serious, but the one I had just last February—will be a year this March—is when I went to the hospital from Kenai and I had to undergo surgery for it.

Q. You wanted a child, didn't you?

A. Yes, I did. Very much.

Mr. Nesbett: I believe that is all, Your Honor.

CATHERINE BRADY
testifies as follows on

Cross Examination

Q. (By Mr. Butcher): Mrs. Brady, during the years you have been married to Mr. Brady you have gotten to know him pretty well, haven't [74] you? A. Yes, sir.

Q. Sometimes he doesn't tell you the entire truth, does he?

A. I have never known him to lie to me.

Q. You never caught him in a lie? A. No.

Q. In all the years you have been married to him?

A. Not actually. He would be very evasive. If

(Testimony of Catherine Brady.)

I asked him about something, or something pertaining to the arguments especially with Mrs. Hollmann he would become evasive so it wouldn't cause another argument, but I have had complete faith and trust in him.

Q. On some occasions when you asked him about where he had been and what he was doing he would tell you something that wasn't true, wouldn't he?

A. No, that is not so. I knew at all times where he was, or most all times.

Q. And you say that when he did tell you something you could rely upon it implicitly?

A. Yes, sir.

Q. Never betrayed your trust?

A. No, he never did.

Q. Did you testify that when you were down in the states with your brother in Reno he called you long distance on the telephone? [75]

A. Yes, he did.

Q. He told you to come back?

A. He asked me to come back.

Q. And sent you the money?

A. That was the telephone call, yes.

Q. And he said he would send you the money to come back and treat you nicely when you got here?

A. He said for me to come back and talk it over. He didn't say how he would treat me.

Q. When you did get back he was drunk and wouldn't talk it over?

(Testimony of Catherine Brady.)

A. Not the morning I came in. I was home 2 hours——

Q. At least that is one occasion when he didn't keep his word?

A. I could explain that very well. I sent a telegram from Seattle stating that I would be home at 6:00 in the morning and on the telegram they had 6:00 p.m. In fact, when I came in the house Ray Barger was staying there. It was Ray that met me at the door and he also had a maid come in that day or that morning to clean the house up because he was expecting me home that evening and Ray Barger is the one that showed me the telegram to show me that mistake.

Q. Why were you indignant then?

A. I didn't realize there was a mistake in the telegram. I was very indignant at the airport and called all over because I did send a telegram.

Q. When you finally understood his drunkenness was not a result [76] of ignoring you then you didn't feel so badly towards him?

A. Yes, I did. Well, I didn't feel too badly towards him. I decided I would sit and wait and have him tell me why.

Q. Did you approve of his heavy drinking?

A. No.

Q. Did you ever berate him about it?

A. Just during the time he did a lot of drinking.

Q. Would you get him to promise not to do it any more?

A. Never. That was one promise I never asked

(Testimony of Catherine Brady.)

him. I knew that if he wanted an occasional drink he would go ahead.

Q. I am talking about the heavy drinking?

A. He never promised me he would stop drinking.

Q. When you berated him about it didn't he apologize about it? A. He was sorry.

Q. Did he say he wouldn't do it again?

A. No, never, no, sir.

Q. Now, after he came home on this occasion and told you what he thought Mrs. Hollmann had said, did you ever make any investigation yourself to find out if Mrs. Hollmann actually said that?

A. Well, I had Sam Mealey sit there and talk to me and also——

Q. I don't want you to state what Sam said. I am asking you if you went to Mrs. Hollmann and asked her if she said it?

A. No, I did not go to Mrs. Hollmann.

Q. You had plenty of opportunity to go to Mrs. Hollmann and [77] get the truth, did you not?

A. But I wouldn't speak to her after she made that statement.

Q. Sometime later you spoke to her?

A. Much later, yes.

Q. Did you take occasion then to ask her if she made any such statement?

A. No, I wasn't going to ask her. I took both of their words; Sam wouldn't lie and my husband, above all, wouldn't lie to me and he certainly

(Testimony of Catherine Brady.)

wouldn't have treated me like that with just figmentation of his own mind. Chuck is not like that.

Q. To answer the question now did you on the several occasions when you talked to Mrs. Hollmann, either friendly or otherwise, did you at any time ask her if she actually said that?

A. No, I didn't.

Q. And you had an opportunity to do so, didn't you?

A. Yes, I did, but I wouldn't ask her.

Q. But you preferred to believe your husband?

A. And Sam Mealey.

Q. There is no testimony Sam Mealey said anything at any time. Did you testify when Mr. Nesbett asked you questions that Sam Mealey ever said anything? A. He did come in and——

Q. I am not asking you what he said. I am asking you if you previously testified about Sam Mealey saying anything? A. No. [78]

Q. Now each time your husband would come home and abuse you, as you stated, mostly in this drunken condition, did you ever question then whether he could have been telling you this and whether it might not be true?

A. Beg your pardon.

Q. Did it ever occur to you during any of these times which he abused you in a drunken condition that his statement might not be true?

A. I never disbelieved him.

Q. Did you ever doubt anything he ever told you? A. Not in the least.

(Testimony of Catherine Brady.)

Q. How many times did you say you had been married? A. 3 times.

Q. 3 times, divorced from each husband?

A. Yes.

Q. Mrs. Brady, what is your occupation?

A. Right now?

Q. Well, yes, right now?

A. Right now I dispatch cabs and I take care of telephones and occasionally I take a few trips during the day.

Q. Do you have any other job down there?

A. Just telephone operator.

Q. Do you participate in any card games as dealer?

A. No, sir, I am not doing anything like that.

Q. Have you ever run a card game as a dealer?

A. Yes.

Q. Here in Anchorage? A. Yes, sir.

Q. You were doing that, were you not—most of the time since you came up here you were working in a house where they gamble and run a card table, were you not?

A. No, sir, not mostly. When I was up here I did about 3 or 4 days at one time and for a very short period of time.

Q. Do you remember a place called Peterson's out here? A. Yes.

Q. Were you a dealer in that place?

A. Just for about a week when I first came up.

Q. Do you remember a man named Fannin, Buzz Fannin?

(Testimony of Catherine Brady.)

A. Yes, I did. That was Malane and not Peterson.

Q. Did you run a table in that place?

A. Yes, I worked out there.

Q. During all the time you have been married to Mr. Brady did you run a card table?

A. Yes, sir, I did.

Q. Off and on? A. On a few occasions.

Q. Now, before you married Mr. Brady and was married to your former husband—what is his name?

A. Wes Bubuto.

Q. Wasn't he a gambler? [80]

A. No, you couldn't call him a—he was a croupier.

Q. Croupier?

A. A croupier is somebody that takes care of the gambling table.

Q. You worked with him from time to time?

A. I worked down in Reno, sir. I worked there from '43 to '47 at the gambling tables, yes, sir.

Q. Now, after 2 previous marriages and your marriage to Mr. Brady you were still unsophisticated enough that you believed everything he told you as the literal truth, is that your testimony?

A. Yes, I do believe him.

Q. Has any man ever lied to you?

A. Yes.

Mr. Nesbett: I object to that question.

The Court: Objection sustained.

Q. Now, on the 24th day of November 1951 were

(Testimony of Catherine Brady.)

you employed at the Red Cab Company as a dispatcher and bookkeeper?

A. I was working on their books at the time. I had not been working for about—I would say about a week. During that time I was still doing their books, yes.

Q. And how long after that period did you continue to——

A. I worked there all the time until just before I left and I would take off, oh, maybe a night or 2 a week when I wasn't feeling well and they would put a driver in or I would have to put a driver in. It was Chuck's part I had to take [81] care of. He had to take care of his own 8-hour shift.

Q. How long did you continue to work for Red Cab until you finally quit?

A. In fact, I quit the morning that I left. I was at the dispatch table when I quit.

Q. Your leaving was entirely voluntary on your part, was it not?

A. It was because he was that abusive and he was drunk again. I knew what I would have to face if I went home again. I couldn't take that so I picked up and left.

Q. So you voluntarily quit?

A. I quit Mr. Brady.

Q. He didn't fire you? A. No.

Q. Mrs. Hollmann didn't fire you?

A. She couldn't fire me.

Q. And no one else fired you?

A. Nobody could fire me. The only one who

(Testimony of Catherine Brady.)

could say I couldn't work there was my husband. He was taking care of his own 8-hour shift like they were.

Q. Did your husband go around and tell other people about this statement that was made, to your knowledge?

A. Not to my knowledge, no.

Q. He told only you so far as you know?

A. So far as I know I am the only one he told.

Q. Now, do you know that that story circulated around anywhere? A. Yes, I know that.

Q. You know that. Well, then do you know who circulated it?

A. It was discussed the day after the incident happened.

Q. Where was it discussed?

A. Besides Chuck and myself it was discussed at my home with Sam Mealey.

Mr. Nesbett: I——

Mr. Butcher: I asked——

The Court: You will have to talk one at a time.

Mr. Butcher: Your Honor, I am asking her if the story got around and she said, yes, and I said in what manner did it get around and she said, "Mr. Brady, Mr. Mealey and I discussed it at my house." That is not responsive to the question.

A. It must have been discussed because everybody knew it.

Q. You don't know that it was discussed?

A. It was discussed around the cab stand.

Q. But you don't know who discussed it?

(Testimony of Catherine Brady.)

A. I know a few people.

Q. You said you didn't know whether Mr. Brady had discussed it?

A. I don't know who started the discussion, but it was discussed that morning by the different employees at the cab stand.

Q. It didn't cause you to lose your job?

A. Not my job because I was working in our own interest. It [83] was our own 8-hour shift I was taking care of.

The Court: We will recess this case now. Ladies and gentlemen of the jury, bear in mind the admonition heretofore given you and be back in the courtroom at 10:00 o'clock tomorrow morning. Adjourn until 10:00 a.m.

(Thereupon, at 4:58 o'clock p.m., this case was adjourned to the next morning, to be resumed at 10:00 o'clock a.m., February 1, 1955.)

The Court: Plaintiff may resume the stand.

CATHERINE BRADY

resumes the witness stand and testifies as follows on

Cross Examination—(Continued)

Mr. Butcher: May I have the reporter read the last question, Your Honor?

The Court: Yes.

(Whereupon, the reporter read the question Line 24, Page 83 and answer Line 25, Page 83.)

Q. (By Mr. Butcher): Mrs. Brady, I believe

(Testimony of Catherine Brady.)

you told the court, to one of Mr. Nesbett's questions, about a miscarriage you had?

A. Yes, sir.

Q. Will you give me the date of that again?

A. Beg your pardon.

Q. The date when the first one occurred?

A. My first one occurred in 1951.

Q. Was that September or October 1951?

A. It was the first year we moved into 229 East 5th Avenue and I think it was '51 when we moved in there, or '50.

Q. Did you testify yesterday it was September or October of 1951?

A. I thought it was 1951. It was the first year we moved in to 229 East Fifth and that was the year it happened. I believe [86] that it was 1950 we were living there.

Q. And had 2 others after that?

A. Yes, sir.

Q. And do you recall when the other 2 occurred?

A. The second one wasn't a serious one at all. It was about a 6-weeks pregnancy and the other one was here last year. I had to undergo surgery.

Mr. Nesbett: Your Honor, I realize the miscarriages might be pertinent, but I think there is no point in going into all this. If it occurred after these remarks were made and could possibly have affected her health then it might be pertinent, otherwise I can see no reason to go into it.

Mr. Butcher: That might be true, Your Honor, except counsel brought out from this witness on

(Testimony of Catherine Brady.)

direct examination and established the fact that it was a miscarriage occurring in September or October 1951 and then 2 at a later period and I simply want to establish the dates so I can determine whehter they coincided with other illnesses which she claimed. It is proper cross examination.

The Court: Well——

Mr. Nesbett: I tried to confine my direct to the period that would only be pertinent to the jury in this case in determining whether her illness might have been caused by some other factor.

The Court: Well, you mean you attempted to confine [87] your testimony to a time subsequent to these alleged defamatory statements?

Mr. Nesbett: I tried to do that, but I will admit that she did mention 2 or 3 of them and some of them were prior to—long prior to the date that Mrs. Hollmann made these remarks. What bearing would they have on this case then?

The Court: Of course, the only bearing that these incidents could have is as they might account for her later state of health and I suppose that is the reason why counsel for the defense is going into them, otherwise they would be absolutely immaterial.

Mr. Butcher: I agree, Your Honor, and that is the purpose for which I desire—I will only ask one more question on the subject.

Q. (By Mr. Butcher): Mrs. Brady, do you have what is known as susceptibility for miscarriage? A. Yes, sir.

(Testimony of Catherine Brady.)

Q. You do? A. Yes.

Q. You also spoke of having a heart attack or heart attacks. Would you indicate if you can when you had your heart attacks?

A. Beg your pardon.

Q. Your heart attacks? [88]

A. When did I have them?

Q. Yes.

A. I hadn't had any heart attacks until—my first one was in December of 1951. It was a slight one. And in February just shortly before I left is when I had a serious heart attack—January of '51 is when.

Q. January of——?

A. January of '52 is when I had a serious one and the early part of March is when I left.

Q. Did you go to the doctor for treatment in connection with that heart attack?

A. He gave me nitroglycerin to take.

Q. Did he diagnose——

A. A heart condition, yes.

Q. In what nature?

A. He said it was mostly from a nervous condition that brought these heart attacks on. I guess something, oh, tension.

Q. I didn't ask you that. Did he give the heart condition a particular name? Did he designate——

A. No, he didn't tell me. He just told me I had a heart condition. He didn't specify the type.

Q. Did you receive from him anything in writ-

(Testimony of Catherine Brady.)

ing which would indicate what kind of heart disease it was?

A. No, I haven't got anything in writing.

Q. And he didn't specify? [89]

A. No, he didn't specify.

Q. You know there are a good many types of heart condition? A. Yes, sir.

Q. You don't know which one it was?

A. No, I don't know the name of it.

Q. Who was the doctor that treated you for that? A. Dr. Davis.

Q. Now, other than the operation which you referred to yesterday, did you have any other medical treatment Outside?

A. In 1950 when I went out for the operation?

Q. No, later, in 1951, '52 or '53?

A. In 1952 when I went out I had to see a doctor because I kept fainting. I would walk a couple of blocks and everything would turn black. I went to Dr. Elliott. He is a heart specialist in Reno.

Q. Did he diagnose your heart condition?

A. Yes, he did and he did say if I needed testimony, if I needed his to send to him and I would get it.

Q. But you don't know which type heart condition it was?

A. He did mention, Mr. Butcher, but I don't remember.

Q. In reply to a question I put to you yesterday

(Testimony of Catherine Brady.)

regarding whether you had run a gambling game in Kenai—you said no, did you not?

A. No, you didn't ask me whether I ran it in Kenai. You——

Q. I will ask you now. Did you run one down in Kenai? [90]

A. Yes, in 1952, for a short period.

Q. During some of the time that you were running that game did Mrs. Hollmann stay at your house and take care of the telephone?

A. She didn't take care of the telephone. She came in to see Marie Cox and didn't want to stay at her place so she stayed—Mr. Brady asked her to stay over to my house. We had a spare bedroom.

Q. Did you tell her on that occasion you were going out to deal cards and wanted her to take care of the telephone?

A. No, I did not. I did not ask her to take care of the telephone. Mrs. Porter is the telephone operator down there, the dispatcher.

Q. Do you know a woman by the name of Ruby?

A. Yes, I do.

Q. Have you ever filed a slander suit against anyone else?

A. I haven't filed a slander suit.

Q. Have you filed a slander suit or brought charges against a woman known as Ruby?

A. Yes.

Q. And is that for slander? A. No.

Q. What was that for?

A. I brought charges against her for maintain-

(Testimony of Catherine Brady.)

ing and operating a baudy house and selling liquor without a license. [91]

Q. Was that down in Kenai?

A. That is in Kenai.

Q. Did she ever at any time speak any slanderous words to you? A. Beg your pardon.

Q. Did she at any time speak any slanderous words for which you contemplated bringing charges? A. No.

Q. Now, isn't it a fact, Mrs. Brady, that your relations with Mrs. Hollmann have been very friendly during all this period of time?

A. You mean the period after the accusation was made?

Q. Since the slanderous words were alleged to have been uttered?

A. No. The only time we have been friendly—the first occasion we had to talk was when Ray Barger brought his suit against the corporation or against the company and they had taken the cars and they brought me in to talk to her and that was just business because we——

Q. In fact, during all this period of time you have exchanged birthday gifts, Christmas cards, birthday cards——

A. No. I sent her a Christmas card. She, the first year, sent me a Christmas present which I did not open, refused to open and my husband and Sam Mealey opened it because they were curious to see what was in it. It stayed there 6 weeks before it was opened.

(Testimony of Catherine Brady.)

Q. Did you send her Christmas presents? [92]

A. No.

Q. Nor birthday presents?

A. No, I didn't.

Q. You are sure of that? A. Yes, I am.

Q. But you did send Christmas cards?

A. I sent Christmas cards, yes.

Q. Did you have on several occasions social meetings with Mrs. Hollmann in which you went around together?

A. Not since 1951, the latter part, nothing social.

Q. Did you hear your husband testify yesterday that you and he and Mr. and Mrs. Hollmann went out for a ride in the car and stopped at a cocktail lounge and had a drink together?

A. That was prior to this. We went up to Palmer. We went out for a day's outing. We went up to Wasilla Lake and took pictures on the way down and stopped at the different cocktail lounges.

Q. Calling your attention to your husband's testimony yesterday, at a time after this happened he said, I believe, that you and he and Mr. and Mrs. Hollmann went to a cocktail lounge here in Anchorage and had a drink. You have no recollection——

A. I have no recollection of that, Mr. Butcher.

Q. When you came back from the states at the end of that 3 months period, when you testified your husband was intoxicated and didn't meet you, did you then go back to work for [93] the Cab Company? A. No, I didn't.

(Testimony of Catherine Brady.)

Q. Did you ever go back to work for the Cab Company? A. Yes, I did.

Q. When did you go back to work?

A. It was about the latter part of October or early part of November of '52 and I was dispatching and dispatched ever since. And then worked as bookkeeper for the corporation in '52. At that time the company was incorporated.

Q. And you have worked generally ever since?

A. Until I left for Kenai. We moved down there, completely, to Kenai—we moved down there in '53. My husband went down in April and I moved down there the end of May or early part of June because we broke in another bookkeeper from the first of June in 1953.

Q. But you have worked down there driving cabs and dispatching?

A. Telephone operator, yes. In 1953 Mrs. Porter was the one that was driving days and I would only drive occasionally if the business warranted it. I have just started to drive steady or more so days in the past 6 months now.

Mr. Butcher: That is all.

CATHERINE BRADY

testifies as follows on [94]

Redirect Examination

Q. (By Mr. Nesbett): Mrs. Brady, didn't you state in response to one of Mr. Butcher's questions

(Testimony of Catherine Brady.)

that Dr. Davis diagnosed your heart ailment as being a result of nervous tension?

A. Nervous tension, yes, sir.

Q. You don't remember any Latin or medical name for the type of——

A. I can't remember, no. He said that it was due to nerves and it would—the contraction of muscles or something due to nervousness is what caused the heart ailment and also caused the blackouts I was getting.

Q. Now, did Dr. Elliott give substantially the same diagnosis as Dr. Davis? A. Yes, he did.

Q. Now, would you state whether or not your act in sending a Christmas card to Myrtle Hollmann was intended as any particular gesture of friendship?

A. Well, I have nothing against Mr. Hollmann and I didn't think there was any reason why I shouldn't send him a Christmas card. I wrote the Christmas card to Mr. and Mrs. Hollmann. It was just a gesture of Christmastime and I sent the card.

Q. I believe you said you worked in a gambling place here in Anchorage for a short while?

A. Yes, sir, I did. [95]

Q. I will ask you whether or not Mrs. Hollmann ever frequented the place?

A. Yes, she did. She came out there several times; her and Carl Hollmann both.

Q. And did they play devices or games that were going on? A. Yes, they did.

Q. Did you say several times?

(Testimony of Catherine Brady.)

A. Several times, yes, sir.

Mr. Nesbett: That is all.

Mr. Butcher: Just one moment, Your Honor. Your Honor, this is not proper recross examination. I should have asked this earlier this morning and haven't had a—I have overlooked something here.

The Court: You may ask.

Q. (By Mr. Butcher): You stated yesterday, did you not, Mrs. Brady, that your purpose in bringing this suit was to compel Mrs. Hollmann to prove the truth of her statement?

A. To bring that June up here and prove that I was in Butte, Montana, and I worked on a line.

Mr. Butcher: That is all.

Mr. Nesbett: That is all.

* * * * *

[Endorsed]: Filed July 1, 1955.

[Endorsed]: No. 14809. United States Court of Appeals for the Ninth Circuit. Myrtle Hollmann, Appellant, vs. Catherine Brady, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: July 5, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14809

MYRTLE HOLLMANN, Appellant,

vs.

CATHERINE BRADY, Appellee.

STATEMENT OF POINTS RELIED UPON FOR APPEAL

The points upon which appellant intends to rely on this appeal are as follows:

1. That the Court erred in giving Instruction No. 3.

2. That the Court erred in giving Instruction No. 6.

3. That the Court erred when it refused to accept defendant's proposed Instructions to the Jury, numbered 1 to 6 inclusive.

4. That the Court erred in submitting the case to the jury when there was no evidence produced by the plaintiff that the injuries of the plaintiff were the direct or approximate result of the slanderous utterance.

5. That the Court erred in denying defendant's motion for judgment of acquittal when the plaintiff rested.

6. That the Court erred in denying defendant's

motion for judgment of acquittal when both plaintiff and defendant had rested.

7. That the Court erred when it sent every other juror on the jury panel to another place, depriving the defendant of her right to have a jury drawn from the whole panel in accordance with Section 55-7-41, ACLA 1949.

Dated at Anchorage, Alaska, this 14th day of July, 1955.

/s/ HAROLD J. BUTCHER,
Attorney for the Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 18, 1955. Paul P. O'Brien, Clerk.

No. 14809

United States
Court of Appeals
for the Ninth Circuit

MYRTLE HOLLMANN,

Appellant,

vs.

CATHERINE BRADY,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court for the Territory of Alaska Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-13-56

No. 14809

United States
Court of Appeals
for the Ninth Circuit

MYRTLE HOLLMANN,

Appellant,

vs.

CATHERINE BRADY,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-13-56

In the District Court for the District of Alaska, Third Division

A-7523

TRANSCRIPT OF EXCERPT OF PROCEEDINGS

On Monday, January 31, 1955, 10:00 o'clock a.m., in open court at Anchorage, Alaska, before the Honorable J. L. McCarrey, Jr., U. S. District Judge, the following proceedings were had:

The Court: You may call the roll of the jury.

(Thereupon, the Deputy Clerk called the roll of the petit jury.)

Deputy Clerk: Regular panel of petit jurors is all present, your Honor, except Bonnie B. McBride.

The Court: Very well. May I have the list, please. * * *. The court would ask you to read the panel. We are going to have to split you up. We have two jury trials today and the first list called will be the list that will go to the Presbyterian Church. Those of you who are not called will remain in this courtroom. The Presbyterian Church is at the corner of 5th and "F" Streets and you enter from the 5th Avenue side.

(Thereupon, the Deputy Clerk read the list.)

The Court: Now, ladies and gentlemen, it is very important that all of you whose names were just called go to the Presbyterian Church. Owing to the fact Mrs. McBride isn't here we will barely have a quorum so you will have to be there, otherwise, the

court will not be able to proceed with the trial, so those of you whose names were just called please report there. Is there any question? This court will stand in recess until the call of the gavel.

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled court, hereby certify:

That the foregoing is a true and correct transcript of the excerpt of proceedings taken by me in stenograph in open court at Anchorage, Alaska, on January 31, 1955, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

In the District Court for the District of Alaska,
Third Division

On Monday, January 31, 1955, 10:05 o'clock a.m., in open court, Presbyterian Church, Anchorage, Alaska, before the Honorable J. L. McCarrey, Jr., U. S. District Judge, the following proceedings were had:

The Court: Mr. Hellenthal and Mr. Renfrew, the way this jury was chosen to come over here was every other name throughout the entire alphabet, so that——

Mr. Renfrew: Well, I have serious doubt, your Honor, that that would not be reversible error in a case of this kind. I don't intend to take any objection to it, but I do question that seriously.

The Court: Well, will you come and see the court and the court would like to have your thinking in that respect. We have a panel. We have to have 24.

Mr. Renfrew: Your Honor, before you go ahead at all, I think this case was settled. * * *

Mr. Hellenthal: Yes, the case has been settled, your Honor.

The Court: That being the case we won't have to worry about reversible error.

Mr. Renfrew: Certainly not in this case.

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Special Official Court Reporter of the above-entitled court, hereby certify:

That the foregoing is a true and correct transcript of excerpt of proceedings taken by me in stenograph in open court, Presbyterian Church, Anchorage, Alaska, on January 31, 1955, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

(Duly certified.)

No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
Appellant,

vs.

CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
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CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

JURISDICTION.

The United States Court of Appeals for the Ninth Circuit has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92 of the Judiciary and Judicial Procedure Act, 28 U.S.C.A., June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294). Practice in the District Court for the District of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U.S.C.A. 103A.

STATEMENT OF FACTS.

The plaintiff, Catherine Brady, is the wife of Charles Brady, who together with the defendant and another person, Sam Mealey, as partners operated a taxicab company in Anchorage, Alaska. This partnership had been in existence for several years and the plaintiff, Catherine Brady, following her marriage in November, 1949 to Charles Brady, had become an employee of the cab company in the capacity of dispatcher.

Some time before the 14th of November, 1951, Charles Brady and Sam Mealey had proposed to Myrtle Hollman, the defendant, that the three partners form a corporation and operate the cab company as a corporation. The defendant had been reluctant (R. 17) to operate under a corporate organization (R. 18) for fear that Brady and Mealey would control the same and "take over the company" (R. 18). On or about the 14th of November, 1951, a meeting was held between the three partners at Mrs. Hollman's home to discuss the matter.

The defendant had been informed by a woman known as Marie Cox that the plaintiff had formerly lived in Butte, Montana, where at one time she had been a prostitute, and during the discussion with Brady regarding the forming of a corporation, and for the reason that plaintiff was now an employee of the cab company, defendant thought it her duty to tell Brady what she had heard.

On the other hand Brady testified that during the discussion regarding incorporation the defendant be-

came angry and told him that Mrs. Brady was an ex-whore from Butte, Montana (R. 19).

Brady, prior to his marriage to plaintiff, had been married and divorced from defendant's daughter. He had been a heavy drinker and had continued his use of intoxicating liquor after his marriage (R. 39).

Brady admitted also that he and the plaintiff for a period of six weeks, prior to their marriage, had lived together in an apartment in Anchorage (R. 42). The marriage of plaintiff and Brady was the third marriage for the plaintiff (R. 82) and plaintiff admitted that she had been a card dealer and had worked in gambling houses in Reno, Nevada, and had also worked as a card dealer both prior to her marriage to Brady and after in gambling houses in Anchorage and Kenai, Alaska (R. 82, 83).

Following the occurrence of the alleged slanderous statement, Brady returned to his apartment and told plaintiff what the defendant had said and asked plaintiff if it was true (R. 20). Plaintiff answered by stating that she had never been in Butte, Montana, and had never been a prostitute (R. 20, 61). Brady then left the apartment and did not return until the following morning, at which time he had been drinking heavily (R. 21) and according to plaintiff's testimony Brady cursed her and accused her of being a whore (R. 62). The plaintiff continued to work thereafter as a dispatcher for the Red Cab Company and the only time thereafter that the matter of the alleged slanderous statement came up was when Brady was drinking (R. 41, 63, 81) and at such times he would curse and abuse the plaintiff.

An examination of the testimony of both the plaintiff and her husband, Charles Brady, will show that such distress and suffering occasioned by the alleged slanderous statement resulted from Brady's conduct and then only when Brady was drunk. On several occasions Brady's conduct, while under the influence of liquor, became so violent as to cause Mrs. Brady to become ill, according to her testimony, and that she suffered a mild heart attack, and on one occasion left Brady and went to the States and did not return for three months, and that she only returned then because Brady called her long distance and asked her to return. She further testified that she came back to Alaska by plane and arrived in Anchorage early in the morning and that Brady was not at the airport to meet her, so she went on to the apartment, where some time later Brady came in drunk and mistreated her again. Mrs. Brady also testified that she did not approve of Brady's heavy drinking and often berated him about it (R. 79, 80), after which Brady would say he was sorry but would not promise to stop drinking (R. 80).

Neither Brady nor Mrs. Brady, the plaintiff, testified to any financial loss suffered by the plaintiff as a result of the alleged slanderous statement and Brady himself, the husband of plaintiff, admitted on cross-examination that he had faith in his wife, but when he got drunk he had doubts about her (R. 41).

The plaintiff thereafter filed her complaint and prayed for relief in the sum of $50,000.00 but pleaded no special damages (R. 3).

THE TRIAL.

The case proceeded to trial on the 31st day of January, 1955, before a jury. At the close of the evidence the defendant proposed certain instructions which were denied.

The Court then gave, among other instructions, number 3 and number 6, to which the defendant excepted. Following the giving of these instructions the case went to the jury which, after deliberation, returned a verdict awarding $1,500.00 to the plaintiff. The defendant appeals from the judgment based on that verdict.

QUESTIONS PRESENTED.

1. Whether the statement "Your wife is an ex-whore from Butte, Montana," is slander *per se* under the law as applicable in the Territory of Alaska.

2. Whether Instruction No. 6 correctly instructed the jury on the law of damages with respect to injuries arising from a slanderous utterance not constituting slander *per se.*

3. Whether Instruction No. 6 correctly instructed the jury as to the measure of damages when the *only* injuries suffered by the plaintiff were occasioned by plaintiff's husband while he was in an intoxicated condition.

ARGUMENT.

POINTS ONE AND THREE.

For purposes of argument appellant will join points one and three, which cover the instructions on slander given by the Court and the instructions on that subject proposed by appellant.

The Court in giving Instruction No. 3 did not correctly state the law of slander prevailing in the Territory of Alaska.

The general rule in connection with the utterance of words imputing unchastity to a woman is found in American Jurisprudence, Volume 33, Section 36 at page 59 and is as follows:

> "As respects oral charges of unchastity, the common law is that no mere words of mouth, no matter how gross, imputing a want of chastity to a woman, whether married or unmarried, will support an action for slander, without allegation and proof that such defamation has actually produced some special damage to the object of the slander. * * * Despite its harshness this common-law rule has been recognized in the United States, and it has been held in numerous instances that words imputing want of chastity or charging fornication are not actionable per se. * * *"

The same rule is similarly stated in Corpus Juris Secundum, Volume 55, page 70, as follows:

> "* * * As a general rule at common law oral words imputing a want of chastity, whether the person spoken of is a man or woman, and whether such person is married or single, are not actionable unless the words making such imputation

> cause specific damages. * * * In many states, by force of statutory provision oral language charging unchastity is made actionable per se. Some of these statutory provisions, however, operate only in favor of women, and do not apply in favor of a man against whom such words have been spoken, *and in such a case a man's right to recover for words falsely imputing want of chastity to him depends on the common law.*" (Emphasis ours.)

A more comprehensive statement of the law of slander *per se* is to be found in Newell on slander and libel. Commencing at page 71, Newell begins his treatment of the subject by stating the general rule as follows:

> "Defamatory words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished, are actionable in themselves."

and thereafter exhaustively discusses the subject and establishes that under the common law slanderous words amounting to slander *per se* must impute a crime for which the person, against whom the slanderous words are uttered, could be indicted and punished. The conclusions reached by Newell are similar to those which the Court held in the case of *Pollard v. Lyon,* 91 U.S. 225. That case holds that defamatory words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the

party, if the charge is true, may be indicted and punished, are actionable in themselves; and the same case further holds that if the slanderous utterance does not constitute slander *per se* then special damages must be claimed in the pleadings and proved on trial. This case represents a learned treatise on the whole subject of slander *per se* and slander *in quod* and establishes the rule which is now pronounced in the encyclopedias.

Section 30 of Newell discusses the American rule and lays down a test as follows:

> "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment then the words will be in themselves actionable."

and goes on to state:

> "And this test has been accepted and applied so often and so generally that it may now be accepted as settled law."

The Court has, of course, in Instruction No. 3 rejected the common-law rule and has adopted in lieu thereof a rule or a definition of slander *per se* which is similar or identical to the rule in states where statute has changed or modified the common-law rule. Whether the Court had a right to give the instruction would, it seems, depend upon whether the common-law rule had been abolished insofar as Alaska is concerned by the establishment of a statutory rule on the subject. There is no provision of law in the Territory of Alaska on the subject of slander *per se* changing

in any way the common-law rule. Newell treats the specific subject of utterance imputing unchastity to a woman in a special chapter on the subject and at Section 123 of that chapter at page 140 we find the following language:

> "In Idaho where the common-law rule exists it has been held not per se actionable to call a woman a public prostitute, and the same is true in Delaware, and also in Oregon."

The Oregon case, *Neelands v. Dugan,* 196 Pac. 1116, restates the common-law rule. This same section, Newell 123, further states at page 141:

> "Many states by statute specifically make an imputation of unchastity in slanderous form actionable per se."

It is quite clear that the present Court did not follow the common-law rule. By what authority the Court has modified the common-law doctrine at least for the purpose of his instruction in the *Brady* case we do not know.

We find that this American rule or common-law rule has not been modified or changed in any way in the Territory of Alaska by statute and therefore it would appear that in connection with a slanderous statement imputing unchastity to a woman the common law must be followed and therefore the Court's instruction and definition making a bare statement imputing unchastity to a woman slanderous *per se* without the further qualification that the slanderous words must contain the imputation of a crime, for which the person, against whom the slanderous state-

ment is made, could be charged and punished is erroneous and ought not to have been given. In giving this instruction the Court departed from precedent and without the aid of statutory modification has attempted to change the common-law rule on the subject of slander *per se* and has further departed from the rule heretofore applied in Alaska. With the *Brady* instruction as a guide to the jury, containing two separate definitions of slander *per se,* both of which are incorrect, it had the effect of placing before the jury an instruction on the law which misled them materially and particularly with reference to damages.

POINT TWO.

Instruction No. 6 is not a correct statement of the law of damages and this particular instruction did not serve as a trustworthy guide to the jury in setting a standard by which the jury could assess damages and also failed in giving sufficient guidance as to the measure of damages. With reference to damages, the plaintiff testified that all of her damage, i.e., illness, nervous condition, heart attacks, etc., came as a result of the abuse of her husband, Charles Brady, and that every time Brady got drunk he would abuse her in connection with the statement made by the defendant (R. 41, 49, 54, 55, 63, 67, 71, 81), and Brady himself admitted that he did not believe the statement except when he got drunk. It would appear, therefore, that any damages sustained by the plaintiff was not the direct or proximate result of the statement made by

the defendant, but was the result of the intervention of a third party. The law defining and establishing the various tests for the ascertainment of damages is restated in Section 18, Volume 15, American Jurisprudence at page 408, where the rule sets out as follows:

> "It is fundamental that in order to maintain an action for damages for injuries claimed to have been caused by a negligent or other tortious or wrongful act or omission it be made to appear that such act or omission was the proximate cause of the injuries complained of. In other words, in the ascertainment of liability, the law always refers an injury to the proximate, as distinguished from the remote, cause of such injury. The proximate cause of an injury is most frequently defined as that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred, * * *"

We also refer to Newell who, in a special section of his work on slander and libel, states the law with respect to damages and supports the statement previously quoted from American Jurisprudence that damages must be the direct or proximate result of the alleged slanderous words and must not result from any intervening cause unless the intervening cause was a direct result of the slanderous words, and in Section 796 at page 904, Newell states the rule as follows:

> "Acts of Third Persons. The act of a third party, if directly caused by the defendant's language, is not too remote, provided the defendant

> either did contemplate or ought to have contemplated such a result. The defendant cannot be held liable for any eccentric or foolish conduct on the part of the person he addressed; but only for the ordinary and reasonable consequences of his words. * * *"

If Brady, as he testified, did not believe the statement of Mrs. Hollman to be true except when he became intoxicated and then, and only then, did he abuse his wife and cause her injury, then her injuries surely derived from an intervention of a third party who behaved in an eccentric manner and under the influence of alcoholic liquor, voluntarily consumed, and could not result directly from the statement made by the defendant. In Instruction No. 6 the jury had no proper guide to the assessment of damages but were left to deliberate and decide without a proper and clear statement of the law on the subject, and in fact were instructed that if the plaintiff suffered mentally and was mortified and humiliated or suffered any damage to her marriage relationship, then to award her such amount as the jury though would fairly compensate her and failed to inform the jury that they must find the damages, if any, were the direct result of the defendant's statement without intervening cause or resulting from foolish and eccentric conduct on the part of plaintiff's husband, a third party to the action. If the jury had been properly instructed on this subject they would have then had the opportunity of deciding whether the plaintiff's injuries resulted from the statement made by the defendant or from the eccentric and foolish conduct

of plaintiff's husband, a third party, and if, having this opportunity, the jury had followed the evidence they must clearly have found that all of the plaintiff's injuries resulted from the eccentric and foolish conduct of plaintiff's husband and not from the utterance of the defendant.

POINT SEVEN.

Section 55-7-31 ACLA 1949, entitled "Compliance with Statute", provides as follows:

> "No case, either civil or criminal, shall be tried in any of the Courts of the Territory of Alaska, except in accordance with the provisions of this Act, and any violation of the provisions of this Act is hereby declared to be reversible error. * * *"

Section 55-7-41 ACLA 1949, entitled "Manner of Choosing Jurors", provides as follows:

> "Jurors for the trial of causes both civil and criminal in the District Court shall be chosen in the following manner, to-wit:
>
> When a case which is to be tried by a jury is called for trial, the clerk shall draw from the trial jury box containing the names of those on the regular panel who have been summoned and not excused as jurors, the names of twelve (12) persons; provided that if the panel consists of twenty-four (24) or more jurors available for immediate jury duty, and if the name of a juror is called who is engaged in trying of or deliberating on any other case, such name shall be rejected

and another name drawn in his stead, without delaying the completion of the panel. * * *"

The Territorial Legislature established with great care the method of drawing a jury panel from which subsequently a jury for the trial of the case could be selected and the method established for drawing such a panel was strictly by the law of chance so that no human agent could in any way select an individual for service on that panel. The Legislature further provided that when a jury was to be selected from the panel that the names of all persons on the panel not previously *excused as jurors* should be placed in the trial jury box and that thereafter twelve names were to be drawn from that box, and again the procedure of selecting the first twelve and subsequent names was left to the law of chance.

Immediately prior to the commencement of the *Brady v. Hollman* trial, the district judge departed from the regular procedure and ordered that every even-numbered person on the panel go to another courtroom and that every odd-numbered person on the panel remain for possible selection as jurors in the *Brady* case, leaving available for the *Brady* case only one half of those persons regularly drawn to serve as jurors on the petit jury panel (Sup. R. 99-101). The section above quoted provides that if the name of a juror is drawn who is engaged in the *trying* of or the *deliberating* on any other case that name could be rejected. It appears therefore that the Court has the right to excuse a person from jury service and

from the panel *as a juror* but would not have the right to excuse him otherwise. The Court could also reject the name of an individual drawn from the box if he was then and there serving as a juror in some other case. When the district judge sent every other juror on the panel to another place he deprived the defendant of her right to select a jury from the whole panel and he further, by his action, chose the individuals from whom the defendant could draw a jury. At the time he divided the jury by selecting every other name and excused them from the *Brady* case, they were not then and there serving as jurors in any other case and they were not excused as jurors. It would appear therefore that reversible error was committed when the Court required the case to go to trial over the objection of counsel for the defendant (Sup. R. 99-101), and when it was clearly evident that the method of selecting a jury for the trial of a civil case, as provided in Section 55-7-41 ACLA 1949, could not be followed.

CONCLUSION.

We conclude by stating that the Court's instructions to the jury, numbered 3 and 6, were erroneous and failed to give the jury a correct statement of the law as to slander and a correct statement of the law as to general and special damages, the difference between the two, and which was applicable to the subject case.

The Court also failed to impanel a jury in accordance with Alaska law to the prejudice of the de-

fendant; and for the foregoing reasons the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
February 9, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellant.

No. 14,809

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE HOLLMAN,
Appellant,

vs.

CATHERINE BRADY,
Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The plaintiff, Catherine Brady, was married to Charles Brady in Anchorage, Alaska in November of 1949 (TR 15). Charles Brady had previously been married to and divorced from the defendant Myrtle Hollman's daughter (TR 33). Although Charles Brady's relationship with the defendant, formerly his mother-in-law, was friendly prior to his marriage to plaintiff, that relationship became less friendly and the parties "grew apart" after this marriage (TR 34-37). At the time of plaintiff's marriage, Charles Brady was a partner in the Red Cab Company of Anchorage (TR 16). As of November 24, 1951, plaintiff was employed as a dispatcher by the Red Cab

Company, dispatching on the same shift on which her husband drove one of his cabs. Each of the three partners owned their own cabs and arranged for their own dispatchers on the shifts that they operated (TR 45-47). Each partner kept the profits accuring from the operation of his cabs and they did not account to each other as to profits. The defendant was one of the partners. Plaintiff, in acting as a dispatcher, was the employee of her husband, Charles Brady and not responsible to either of the other two partners (TR 84-85).

On November 24, 1951, the three partners, Charles Brady, the defendant and Sam Mealey, met at the defendant's home to discuss incorporating their business (TR 16). During this discussion, and while angry at Charles Brady, the defendant stated to Charles Brady, "You are not so smart, you have got an ex-whore for a wife", and further stated to Charles Brady that his wife, the plaintiff, had worked with a girl named June in Butte, Montana (TR 19).

The above statement was made in the presence of Sam Mealey. Plaintiff and Charles Brady had been married happily for approximately two years prior to the defendant's statement (TR 31 and TR 63). Charles Brady's habits with respect to drinking intoxicating liquor were fairly moderate prior to November 24, 1951 and during his marriage to plaintiff (TR 63), but after defendant's statement, he often brooded over the remarks and frequently drank to excess and abused plaintiff because of his doubts as to the truth of the statements (TR 41), but arguments

over the defendant's statement were not always the result of drinking (TR 54).

Prior to November 24, 1951, plaintiff was in a healthy condition and weighed 135 pounds. As a result of the attitude of her husband after defendant's remarks and the frequent arguments and abuse, plaintiff became extremely nervous, lost 19 pounds in weight in a period of three months and suffered a heart attack (TR 63-64). As a result of her husband's treatment by reason of defendant's remarks and being no longer able to put up with his attitude and abuse, plaintiff left her husband for a period of over two months but was eventually reunited with him (TR 71). Even after the plaintiff was reunited with her husband, occasional arguments resulted by reason of the statement of defendant and such arguments occurred, though less frequently, even to the date of the trial (TR 71). Plaintiff commenced this suit against her husband's will and without his knowledge (TR 68).

In paragraph 3 of appellant's statement of facts, appellant states as a fact, "The defendant had been informed by a woman known as Marie Cox that the plaintiff had formerly lived in Butte, Montana where at one time, she had been a prostitute, and during the discussion with Brady regarding the forming of a corporation, and for the reason that plaintiff was now an employee of the cab company, defendant thought it her duty to tell Brady what she had heard." There is absolutely nothing in the transcript before the Court to support the above-quoted paragraph. In fact the

transcript at pages 47, 48, 61 and 62 completely refute the purported statement of fact made by appellant. In any case the jury was instructed on privilege.

ARGUMENT.

POINTS I AND III.

Appellant's contention is that the statement "your wife is an ex-whore from Butte, Montana", is not slander per se and therefore, under the common law rule, plaintiff should have pleaded and proved special damages before a recovery could be allowed.

Appellant quotes from American Jurisprudence, Corpus Juris Secundum, Newell on Slander and Libel in support of her contention and cites likewise in support, the case of *Pollard v. Lyon,* 91 U.S. 225.

It would appear that the case of *Pollard v. Lyon* is more in support of the trial court's instructions than in support of appellant's contention, for there the court laid down the rule that words falsely spoken of another may be actionable per se when they impute to the party a criminal offense for which the party may be indicted and punished even though the offense is not technically denominated infamous if the charge involves moral turpitude and is such as will affect injuriously the social standing of the party. But in that case the words at most imputed unchastity.

In this case, the plaintiff was charged with having been a prostitute which is a criminal offense in Alaska and the trial court can be assumed to have taken

judicial notice of this in giving the questioned instruction. The charge is certainly one involving moral turpitude and of such a nature as to injuriously affect the social standing of the plaintiff not to mention her marital happiness.

In support of his contention, appellant cites the Oregon case of *Neelands v. Dugan,* 196 Pac. 1116, which case merely holds that it is controlled by a previous Oregon case entitled *Barnett v. Phelps,* 191 Pac. 502, (1920). It is of interest to note that the *Barnett* case recognized and vigorously criticized the common law rule, indicated that it was in accord with the holding and reasoning of the United States Supreme Court in the case of *Pollard v. Lyon* (supra), but decided that it was controlled by a still earlier Oregon case, *Davis v. Sladden,* 21 Pac. 140. The court stated that if relief from the harsh common law rule was to be obtained in Oregon, it would necessarily have to come from the legislature.

The *Barnett* case examined the early English common law and found that to be a common prostitute was not indictable as a distinct and substantive offense and to characterize a woman as such was not actionable per se except in London town where a whore was "carted". On page 666, the court pointed out that the law in this respect had been changed in England in 1891 and likewise in America in some states by statute and in others by the courts, ". . . declaring the old rule to be a reproach upon the law. . . ."

Completely at variance with the common law rule is the case of *Biggerstaff v. Zimmerman,* S/D Colo.

1941, 114 Pac. (2d) 1098. Colorado law provided that the common law of England should be the rule of decision and to be considered as of full force until repealed by legislative authority. The question before the court was whether or not moral charges of unchastity against a woman would support an action for slander without allegations of special damage. In its opinion, the court cited a previous Colorado case in which the applicability of the common law in Colorado was considered and on page 1099 said

> "Mr. Chief Justice Butler cites the well known legal maxim that, 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.' As to the proposition under discussion, non-liability under the common law was predicated upon the jurisdiction of ecclesiastical courts of such offenses. No such courts ever existed in this jurisdiction, and they are foreign to our fundamental law; therefore, there is no reason to suppose that the common law rule for which counsel for defendant contend ever was applicable in this state. Moreover, our democratic mode of life is not comparable with the conditions of social life in existence prior to the fourth year of the resign of James I of England. Unlike that period, American tradition and civilization, as we know it, has a far greater appreciation of the potential worth and dignity of the individual human being, and the right to be protected therein. English judges many years ago denounced the common law rule here involved as barbarous, with the result that Parliament in 1891 repealed the same."

The court further cited the case of *Battles v. Tyson,* Neb., 110 NW 299, as a case refusing to follow the common law rule and the American Law Institute, Restatement of the Law of Torts, Volume 3, sections 670 and 674 (apparently in error and meaning sections 570 and 574) as adopting the rule supporting the liability of one who publishes a slander imputing unchastity to a woman. It is interesting to note that the question of whether or not the slanderous words alleged to have been spoken in this case actually constituted a crime under the laws of Colorado was not before the court. The judgment sustaining the demurrer was reversed.

Although in Colorado the common law of England was to be the rule of decision *until repealed by legislative authority,* the court held it to be archaic and inapplicable under the circmstances. The wording of Sec. 2-1-2 Compiled Laws of Alaska 1949 provides only that

> "So much of the common law *as is applicable* and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska is adopted and declared to be the law in the Territory of Alaska." (Emphasis supplied.)

See:

Jansen v. Pollastrine (1942), 10 Alaska 316, 322;

McFarland v. Alaska Perseverance M. Co. (1907), 3 Alaska 308, 329, affirmed 164 Fed. 657.

American Law Institute Restatement of the Law of Torts, Volume 3, Section 571, page 171 reads as follows:

> "One who falsely and without a privilege to do so, publishes a slander which imputes to another conduct constituting a criminal offense is liable to the other *if the offense charged is of a type which, if committed in the place of publication would be*
>
> (a) *chargeable by indictment or its modern equivalent,* and
>
> (b) punishable by death or by imprisonment, otherwise than in lieu of fine." (Emphasis supplied.)

In comment (b) under this section it is pointed out that the matter of the statute of limitations was immaterial.

Section 574 at page 183 reads as follows:

> "One who falsely and without a privilege to do so, publishes a slander which imputes to a woman unchastity is liable to her."

In the comments contained in this volume with respect to each of the above-cited sections under "Damages", the slander is actionable per se irrespective of any special harm resulting and if the person spoken of actually sustained special harm, recovery may be had for that harm in addition to the damages otherwise recoverable.

POINT II.

Appellant contends that since the words spoken were not slander per se under the common law rule, special damages must have been alleged and proved and that the court's instruction No. 6 (TR 7) was error; that the trial court committed error in refusing to give defendant's proposed instructions 1-3 inclusive (TR 5-6).

This court must necessarily find that the common law rule applies in Alaska before this point would become pertinent, it would seem.

Even if such a finding is made it is submitted that defendant's proposed instruction No. 3 is not as adequate as the court's instruction No. 6 to guide the jury in determining whether or not special damages had been proved. Special damages were not alleged under the strict rules of pleading in effect in Alaska prior to the adoption of the Federal Rules of Civil Procedure. However, the complaint does set out separate items of damage, such as injury to plaintiff's name and character; her health and the frequent marital disturbances, and would appear to be sufficient under the provisions of Rule 9 (G) F.R.C.P., *without objection.* Defendant was apprised in the complaint of every item of damage intended to be presented at the trial and the court, in its instruction No. 6, properly directed the jury's attention to each item.

Appellant further contends that the injuries suffered by plaintiff were too remote to be the proximate cause of the spoken words.

The defendant must have been well aware of the habits of Charles Brady, her former son-in-law, and must or should have known the effect her words would have upon his conduct.

Newell, Slander and Libel (4th Ed.) Sec. 796 at page 904 clearly states that the act of a third party, if directly caused by defendant's language, is not too remote (to be the proximate cause) provided the defendant either did contemplate or ought to have contemplated such a result.

Here, in addition to knowing Brady's habits and character, defendant knew or must have realized the consequences of speaking such words to a husband and about his wife.

Appellant contends that all of plaintiff's injuries resulted from her husband's brooding and drinking which is not the case. See TR 54 where, under cross-examination by appellant's attorney, Charles Brady testified as follows:

> "Q. Well, all right. Now, Mr. Brady, you state that you were the only one that abused her about this statement and you only did it when you were drunk?
>
> A. Well, it wasn't necessarily all the time when I was drunk. If there was an argument that came up it came up usually.
>
> Q. When you weren't drinking?
>
> A. If I was drinking or not.
>
> Q. But didn't you previously state that it was mostly when you were drinking?
>
> A. Usually when I was drinking."

Certainly it can be assumed that the false statement, "You are not so smart, you have got an ex-whore for a wife", directed at her former son-in-law and present business partner, in anger, were intended to bring him down a notch or two in his own estimation and incidentally create extreme unpleasantness in his home and for the plaintiff whom defendant did not like (TR 34-35, 48-49). And this is exactly what happened.

POINT VII.

Appellant contends that the trial court committed reversible error in dividing the jury panel and sending one-half to another court in Anchorage where a jury trial was scheduled for the same date, citing Secs. 55-7-31, ACLA '49 and 59-7-41, ACLA '49.

Appellant made no objection to the action of the trial judge in dividing the panel of jurors reporting for duty on November 24, 1951 and sending one-half those reporting to another court for a scheduled jury trial. This amounts to a waiver of error in the proceedings, if such there was.

However, in reading the two sections of the Compiled Laws of Alaska relied upon by appellant, it would appear that the court was perfectly at liberty to divide the jurors present in order to permit the simultaneous trial of two civil cases at least as long as the panel remaining consisted of twenty-four available for jury duty, and it can be assumed that such was the case (Supp. Tr. p. 101).

These provisions of Alaska law were considered by this court in *Hauptman et al v. United States,* CCA 9th (1930) 43 Fed. (2d) 86. The court held (p. 90) that while the Territorial Legislature has the power to regulate the method of selection of grand and petit juries, it has no power to regulate the jurisdiction and authority of federal courts hearing appeals from the Territory of Alaska (meaning that portion of Sec. 55-7-31 ACLA '49 reading ". . . and any violation of the provisions of this Act is hereby declared to be reversible error."), and that defendant even in a criminal action cannot take advantage of slight departures from the procedure without showing that his rights have been prejudiced thereby. And on page 88 holding that the burden is on defendant to show by specific facts that he has been prejudiced, specifying how, in what manner, and to what extent.

Appellant fails to point out wherein the rights of the defendant were prejudiced in any manner by the action of the trial court. A legal and actual sufficiency of jurors remained from which to select. Appellant does not even allege that she was forced to exhaust all her peremptory challenges.

In *Alexander v. U. S.,* 138 U.S. 353, two copies of a list of thirty-seven jurymen available for the trial were made available to counsel for the government and defense, the court directing counsel for each side to proceed with its challenges independent of the other side. Counsel for defendant challenged two jurors that had also been challenged by the government. No ob-

jection was made by counsel for defendant. The Supreme Court held that it was the duty of counsel, in a criminal case, to seasonably call the attention of the court to any error in empaneling the jury, in admitting testimony or in any other proceeding during the trial by which the rights of the accused may be prejudiced and failing to do this, cannot rely upon the action of the trial court as error.

In *Beals v. Cone,* S/C Colo. (1900), 62 Pac. 948, the court held that since it was the custom of the El Paso District Court to divide its panel of jurors between its civil and criminal divisions, it was within the discretion of the court in the trial of a civil case to issue a new venire on the exhaustion of the jurors assigned to the civil division instead of drawing jurors from those assigned to the criminal division, *and the exercise of such discretion will not be reviewed on appeal.*

In *Blankenship v. State,* Cr. Ct. App. Okla. (1914), 139 Pac. 840, the court held that the defendant in a criminal action acquired no vested right to have a particular member of the jury panel sit upon the trial of his case until he has been accepted and sworn (and) unless an objectionable juror was forced upon the defendant after he had exhausted his peremptory challenges, he has no ground of complaint. This was a prohibition case. The statute provided that not to exceed twenty-four jurors should be drawn from the box for the panel. In this instance the court ordered the drawing of eighteen names and these persons were summoned—only sixteeen reporting. At the time of

trial, the original panel had dwindled to seven jurors reporting and from these seven jurors, a jury of six persons was selected to try this case.

In *Thomas v. State,* Cr. Ct. App. Okla. (1926) 244 Pac. 816, the court held that although the sheriff, a material witness, was permitted to replenish the jury panel by summoning five jurors on an open venire, after the regular panel had been exhausted and without objection from defendant that the right to challege the poll or the array is a right that may be waived, and in this case was waived.

Since appellant made no objection at the time the panel was divided and there were twenty-four jurors present from which to select; since appellant has failed to mention one respect in which the rights of his client were prejudiced or even that she was forced to exhaust all her peremptory challenges it is submitted that no error was committed.

CONCLUSION.

It is clear that in England, prior to 1891, prostitution was not a crime except in London. To refer to a lady as a whore or prostitute, except in London, amounted only to imputing unchastity in continued acts of fornication or adultery for gain. Falsely imputing unchastity was not actionable per se as it did not impute a criminal act.

Pollard v. Lyon in 1875 held that to falsely impute a crime was actionable per se but that merely imputing unchastity was not. As late as 1920 Oregon, in

Barnett v. Phelps, severely criticized the common law rule but followed an early Oregon case as controlling.

The Restatement of the Law of Torts makes it slander per se to impute a criminal offense of a type which, if committed in the place of publication, would be chargeable by indictment or its modern equivalent. Likewise to falsely impute unchastity to a woman.

Many states have followed the modern reasoning of *Biggerstaff v. Zimmerman* and held the common law rule inapplicable by court decision. Other states have accomplished this by statute.

In Alaska by statute the common law of England is to be considered only when applicable. The trial court did not consider it applicable in framing its instructions in this case and rightly so it is respectfully submitted. There seems to be no basis in reason for considering Alaskan courts bound by a rule of law developed in England over 150 years ago, when individual rights were lightly regarded and only ecclesiastical courts had the power to deal with prostitution. The rule of law was repudiated by England itself before Alaska was barely populated by white men.

Dated, Anchorage, Alaska,
March 12, 1956.

Respectfully submitted,
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Attorneys for Appellee.

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APPELLANT'S REPLY BRIEF.

The reply brief of appellant will be limited to a discussion of two points which, in the light of appellee's brief, require further consideration.

REPLY TO APPELLEE'S ARGUMENT ON POINT ONE.

Appellee, in an attempt to justify instruction No. 3, argues that the court had a right to disregard the common law on slander *per se,* applicable in the Territory of Alaska, and give an instruction on the subject conforming to that in effect in jurisdictions where the legislature has changed or modified the

common law. Appellant believes that a court may not, without benefit of legislative authority, adopt a new rule defining slander *per se* different than the general rule of the common law.

Were it possible to change the rules of the common law whenever the court was dissatisfied with the principles of that law, and without benefit of legislation, then the rules of the common law would be held for naught and new laws would spring from decree of court.

Appellee states on page 4 of her brief, "the plaintiff was charged with having been a prostitute which is a criminal offense in Alaska". This statement is simply not true. Prostitution, as such, at the time of the alleged slanderous utterance and at the time of this trial, was not a criminal offense in the Territory of Alaska. The Alaska Code (Alaska Compiled Laws, 1949) contains a chapter designated as "Chapter 9" (Sections 65-9-1 to 65-9-34) entitled "Crimes Against Morality and Decency". The provisions of this chapter do not make prostitution, as such, a criminal offense. In 1955 the Legislature amended this chapter (Chapter 104, Session Laws of Alaska, 1955) to make it unlawful within the Territory of Alaska to practice prostitution. The trial court could not, as stated by appellee, take judicial notice that prostitution was a crime in the Territory of Alaska.

Appellee, in any event, seems to have overlooked the accusation contained in the alleged slanderous utterance. This utteranc was to the effect that plaintiff was an *ex-whore* from *Butte, Montana.* There was

no charge that plaintiff had practiced prostitution in the Territory of Alaska, but only an utterance to the effect that plaintiff had once been a prostitute in Butte, Montana, and had worked there with a girl named June.

The jury in the subject case was led to believe, by reason of this erroneous instruction, that the utterance or publication of a false statement imputing unchastity *or the commission of a crime such as prostitution* is defamatory and slanderous in itself.

With this instruction as a guide, the jury, if it believed that defendant had spoken the words, could only find for the plaintiff.

The instruction is not a correct statement of the law of slander under the common law, and prostitution, as such, was not a crime in Alaska, and there was no evidence before the court that prostitution was a crime in Butte, Montana.

REPLY TO APPELLEE'S ARGUMENT ON POINT TWO.

In this case the slanderous utterance was made to the husband. He went home and reported the utterance to appellee. She denied to him that she had ever been a prostitute in Butte, Montana, or anywhere else.

Here was a situation where the husband and wife held in their hands the key to injury and damage. Thus, where the husband had sole power to inflict

injury and damage, the possibilities of aggravation were unlimited. The husband could have heaped abuse, mental and physical, upon appellee every minute of the day, if he chose to do so. He abused her only when he got drunk. By his abuse, when drunk, as claimed, she lost weight and had a heart attack. Were the court to give its sanction to injury inflicted by such methods, it would result in temptations to manufacture injury and increase damages, controlled only by the husband's and wife's self-restraint.

Appellee sued for $50,000.00. She showed damages resulting only from her husband's abuse. The injury, if any, and the extent thereof, depending entirely on the husband and wife, could be completely self-serving.

For the foregoing reasons instruction No. 6 was erroneous and the jury was not given a proper instruction on this point, to the defendant's prejudice.

REPLY TO APPELLEE'S ARGUMENT ON POINT SEVEN.

Appellee stated in her brief on page 11, under Point Seven, that appellant had made no objection to dividing the panel of jurors and thus had waived the error, if any.

The supplemental transcript of record, designated after appellee had filed her brief, will show that objection was made to dividing the jury.

CONCLUSION.

In conclusion, for the reasons shown, the judgment of the trial court should be reversed.

Dated, Anchorage, Alaska,
April 10, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellant.

No. 14810

United States
Court of Appeals
for the Ninth Circuit

HAROLD HUTSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Fourth Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–10-14-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

ATTORNEYS OF RECORD

THEODORE F. STEVENS,
U. S. Attorney,
Box 111, Fairbanks, Alaska;

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Box 111, Fairbanks, Alaska;

PHILIP W. MORGAN,
Asst. U. S. Attorney,
Box 111, Fairbanks, Alaska,

Attorneys for Plaintiff and Appellee.

GEORGE B. McNABB,
P. O. Box 682, Fairbanks, Alaska,

Attorney for Defendant and Appellant.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1946 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD HUTSON,
Defendant.

INDICTMENT

Count I.

The Grand Jury charges in Count I of this Indictment:

That on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson feloniously had unnatural carnal copulation, by means of the mouth, with another person, to wit, Virginia Mead, contrary to the provisions of Section 65-9-10 of the Alaska Compiled Laws Annotated, 1949.

Count II.

The Grand Jury charges in Count II of this indictment:

That on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson, as a part of the same transaction set forth in Count I of this Indictment, feloniously persuaded Virginia Mead, a child under the age of 18 years, to participate in an act, to wit, unnatural carnal copulation, by means of the mouth, which act manifestly tended to cause said child to become a delin-

quent child, contrary to the provisions of Section 65-9-11 of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 7th day of January, 1955.

A True Bill.

/s/ W. L. LAMON,
Foreman of the Grand Jury.

/s/ GEORGE M. YEAGER,
Asst. United States Attorney.

Witnesses before the Grand Jury:

Virginia Mead,

Marian W. Perry,

Frank B. Perry.

Presented Jan. 7, 1955. [1*]

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

Defendant moves for the entry of an order continuing the date fixed for the trial of the above-entitled cause for a term of ten (10) days for the following reason:

1. Defendant was confined in the City Jail on April 10, 1955, and was only released therefrom at approximately 5:00 p.m. on April 15, 1955. Although diligent effort was made, Defendant was only able to secure the services of counsel of his choosing at 3:00 p.m. on April 16, 1955.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

2. Defendant's attorney of record, R. J. McNealy, has never discussed the merits of Defendant's case with him or talked to any of the witnesses for Defendant who will be relied upon in defense of the charge pending against Defendant.

3. Defendant's case was set on for trial without the knowledge or consent of Defendant and the first information relative to such setting was brought to the attention of Defendant at approximately 2:30 p.m. April 15, 1955. With the exception of a short conference with Defendant's attorney of record at approximately 12:00 Noon, April 16, 1955, Defendant has not seen or consulted with said attorney of record since on or [3] about the 17th day of January, 1955.

That due to the short notice Defendant and counsel for Defendant will be unable to prepare for trial of the above-entitled cause until approximately April 28, 1955.

This Motion is based upon the affidavits of Defendant and George B. McNabb, Jr., which are attached hereto, marked Exhibits A and B, respectively, and made a part hereof.

Dated at Fairbanks, Alaska, this 18th day of April, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant.

[Receipt of copy acknowledged.] [4]

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Harold L. Hutson, being duly sworn upon oath deposes and says:

That he was confined in the City Jail on April 10, 1955, and was only released therefrom at approximately 5:00 p.m., April 15, 1955. Defendant's attorney of record, R. J. McNealy, has never discussed the merits of Defendant's case with him or talked to any of the witnesses for Defendant who will be relied upon in defense of the charge pending against Defendant. Defendant's case was set on for trial without the knowledge or consent of Defendant and the first information relative to such setting was brought to the attention of Defendant by the Fairbanks Chief of Police at approximately 2:30 p.m., April 15, 1955. With the exception of a short conference with Defendant's attorney of record at approximately 12:00 Noon, April 16, 1955, Defendant has not seen or consulted with said attorney since on or about the 17th day of January, 1955.

That at approximately 5:00 p.m. on April 15, 1955, [5] Defendant was released from the City Jail. Thereafter, and until approximately 3:00 p.m. on the 16th day of April, 1955, Defendant made diligent effort to secure the services of counsel to represent

him upon trial. When Defendant did manage to secure such assistance Defendant was unable to furnish such counsel with a copy of the indictment pending against him, the Office of the Clerk of this Court being closed, and the copy of such indictment which was delivered to Defendant being in the possession of Everett W. Hepp, an attorney previously consulted relative to defense.

/s/ HAROLD L. HUTSON.

Subscribed and Sworn to before me this 16th day of April, 1955.

/s/ D. I. GORE, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires: 3/8/58. [6]

EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

George B. McNabb, Jr., being duly sworn upon oath deposes and says:

That he has been employed to represent Defendant in the above-entitled cause; that he was so em-

ployed at approximately 3:00 p.m. April 16, 1955, and that prior to said date he had never discussed the merits of Defendant's case with him or talked to any of the witnesses who will be offered on behalf of Defendant.

That upon such employment Affiant requested from Defendant a copy of the indictment setting forth the charge pending against him and that Defendant was unable to furnish such copy of such indictment.

That upon such short notice Affiant does not believe that he can properly present Defendant's case until he has had opportunity to study the charges against Defendant and to discuss the matter with the witnesses proposed by Defendant.

/s/ GEORGE B. McNABB, JR.

Subscribed and Sworn to before me this 16th day of April, 1955.

/s/ D. I. GORE, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires: 3/8/58.

[Endorsed]: Filed April 18, 1955. [7]

[Title of District Court and Cause.]

INSTRUCTION TO THE JURY—No 17

[Given]

(17) The offense charged in Count I consists of and in its commission requires the uniting or the joining of the mouth of one person with the sexual organ of another but if you find any penetration however slight it is sufficient. [8]

[Title of District Court and Cause.]

REPORT OF JURY—10:30 P.M., APRIL 19

(At 10:30 p.m., April 19, the jury re-entered the courtroom and the following proceedings were had):

Clerk of Court: Court is reconvened.

The Court: Mr. Gore, I understand you appear as attorney of record for the defendant.

Let the record show the presence of the defendant and his attorney, Mr. Gore. Call the roll of the jury, please?

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Members of the jury, have you reached a verdict?

Mr. Hardenbrook: Your Honor, we are unable

to reach a verdict at this time, and we would like further instructions from the bench and might we have a transcript of the testimony of the witnesses?

The Court: It would require a great deal of time to produce the transcript of the evidence, and that is not considered advisable at this time. The Court feels constrained now in view of the fact that you apparently have not reached an agreement to give you some additional instructions at this time, which the Court shall do. [9]

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTIONS TO THE JURY

This is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict or verdicts. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly and according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiesence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial or more competent to decide it or that more or clearer evidence will be produced on one side or the other. [10]

In conferring together, you ought to pay proper respect to each others' opinions, with a disposition to be convinced by each others' arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the

result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obliged to ask you that you again retire and the court will wait for further message from you.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed April 19, 1955. [11]

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and evidence therein find:

That the defendant, Harold Hutson, is Guilty of the offense with which he has been charged in Count I of the indictment.

Done at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ E. W. HARDENBROOK,
Foreman.

[Endorsed]: Filed and entered April 19, [12] 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and evidence therein find:

That the defendant Harold Hutson, is Guilty of the offense with which he has been charged in Count II of the indictment.

Done at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ E. W. HARDENBROOK,
Foreman.

[Endorsed]: Filed and entered April 19, [13] 1955.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1946—Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD HUTSON,
Defendant.

DOCKET ENTRIES

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all of the salient proceedings in this cause, viz:

1955

Jan. 7—File Indictment.

Jan. 12—File and Enter Order to Produce Defendant, 49/242.

Jan. 18—File and Enter Arraignment and Plea, Plead Not Guilty, Bond Fixed at $5,000.00, 49/262.

Apr. 18—File and Enter Trial by Jury, 50/247, 249 and 250.

Apr. 19—Filed and Enter Verdict, Guilty, 50/250.

Apr. 21—Filed Motion for Reduction of Bond.

Apr. 22—Filed and Enter Order Denying Above Motion, 51/10.

May 3—Filed and Enter Sentence, Ten Years on Count I and Two Years on Count II, to Run Concurrently With Sentence in Count I, 50/304.

May 4—File and Enter Order Denying Bail on Appeal, 50/307.

May 5—File and Enter Judgment and Commitment, Count I, Ten Years; Count II, Two Years to Run Concurrently With the Sentence in Count I, 50/316-317.

May 9—File Notice of Appeal (Copy Attached).

Witness my hand and the seal of the above-entitled Court this 9th day of May, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Harold Hutson, Fairbanks, Alaska.

Name and Address of Appellant's Attorney: George B. McNabb, Jr., 131 Lacey Street, Post Office Box No. 682, Fairbanks, Alaska.

Offense:

Count I: Violation of Section 65-9-10 of Alaska Compiled Laws Annotated, 1949—Sodomy.

Count II. Violation of Section 65-9-11 of Alaska Compiled Laws Annotated, 1949—Contributing to the delinquency of a minor.

Statement of Judgment:

Defendant was tried and convicted on both counts as set forth above. On the 5th day of May, 1955, defendant sentenced to serve a term of 10 years at an institution to be designated by the Attorney General on Count I and a term of two years on Count II, said sentences to run concurrently.

Name of Institution Where Now Confined:

Federal Jail, Fairbanks, Alaska.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated May 9, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Appellant.

[Copy.]

[Endorsed]: Filed May 9, 1955, U.S.D.C.

[Endorsed]: Filed May 12, 1955, U.S.C.A.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant states the following points upon which he will rely upon appeal:

1. The trial Court erred in not granting the continuance upon the verified showing made by counsel for defendant that he had first consulted with defendant on the Saturday afternoon prior to the trial date the following Monday morning and that he did not see a copy of the indictment against defendant until fifteen minutes prior to the time set for trial; that he was totally unprepared to proceed with the trial and that defendant's prior attorney had never discussed the merits of the case with defendant or any of defendant's witnesses.

2. The trial Court erred in not granting defendant's request for a continuance of the case until the following morning after the selection of the jury, said selection having taken from the time of commencement of the trial until 1:45 p.m. Said con-

tinuance was requested for the purpose of allowing counsel for defendant to familiarize himself [14] with the case at trial.

3. The trial Court erred in not granting defendant's motion for Judgment of Acquittal made at the close of the Government's case.

(a) There was a fatal variance between the allegations of the indictment and the proof produced by the prosecution.

(b) The testimony of the alleged victim was not corroborated in the slightest particular and there was not the slightest showing of any threats, coercion, use of force or fear so as to take the alleged victim out of the accomplice rule.

(c) From a consideration of the evidence in a light most favorable to the prosecution, there was insufficient proof to establish the fact that there was any unnatural carnal copulation as alleged in the indictment.

4. The trial Court erred in denying defendant's motion for Judgment of Acquittal made at the close of defendant's case.

5. The trial Court erred in granting one of plaintiff's requested instructions, the same being Instruction Number 17.

6. The trial Court erred in the additional instructions given to the Jury at 10:30 p.m., after the Jury reported that it was unable to reach a verdict, in the following [15] particulars:

(a) The instructions did not correctly state the law and were highly prejudicial to defendant. It is evident that the Jury considered such instructions a mandate from the Court to find the defendant guilty, which was promptly done.

(b) The trial Court erred in not giving defendant an opportunity to object to said instructions out of the hearing of the Jury as provided by Rule 30 of the Federal Rules of Criminal Procedure.

(c) The trial Court erred in not giving to the Jury a transcript of the testimony taken at the time of the trial as requested by the Jury, or, in the alternative, declaring a mistrial.

Dated at Fairbanks, Alaska, this 30th day of June, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant-Appellant.

[Copy received.]

[Endorsed]: Filed July 1, 1955. [16]

[Title of District Court and Cause.]

DESIGNATION OF CONTENT OF RECORD ON APPEAL

Defendant-Appellant designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, the following por-

tions of the record, proceedings and evidence in this action:

1. The indictment.
2. Defendant's motion for continuance filed upon the date of commencement of trial.
3. The entire transcript of testimony taken upon trial.
4. Instruction Number 17.
5. Report of Jury made at 10:30 p.m., on April 19, 1955, said report appearing at pages 112-113 of the typewritten transcript.
6. The additional instructions to the jury.
7. Verdict of Jury.
8. Statement of points on appeal.
9. This designation.

Dated at Fairbanks, Alaska, this 30th day of June, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant-
Appellant.

[Copy Received.]

[Endorsed]: Filed July 1, 1955. [17]

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1946 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD HUTSON,

Defendant.

Appearances

THEODORE F. STEVENS,
United States Attorney, and
GEORGE M. YEAGER,
Assistant U. S. Attorney,

Attorneys for Plaintiff.

ROBERT J. McNEALY,
GEORGE B. McNABB, JR., and
T. N. GORE, JR.,

Attorneys for Defendant.

* * *

April 18 and 19, 1955

Be it Remembered, that at 10:00 a.m., upon the 18th day of April, 1955, the trial of this cause, No. 1946 criminal, was begun, plaintiff and defendant represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Are counsel ready to proceed with the United States versus Hutson?

Mr. Stevens: Your Honor, the defendant has

filed a motion which we would ask that the Court consider at this time and also ask that the prospective jurors step out into the hall while we discuss this motion.

The Court: Is the defendant, Harold Hutson, present?

Mr. Hutson: Yes, sir.

The Court: All right, let the record show the presence of the defendant. This motion filed this morning, Mr. Stevens?

The Clerk: Just now. I never have seen it before.

The Court: I see, just presented to you now, Mr. Hall?

The Clerk: That's right, just filed this morning, sir.

The Court: The Court is now ready to hear from counsel.

Mr. Stevens: I believe Mr. McNealy wishes to withdraw from this matter, your Honor. [3*]

Mr. McNealy: With the permission of the Court and at the request of the defendant, your Honor, I would like to withdraw as attorney of record for this defendant. I might state that the defendant saw me at noon Saturday and stated that he wished to employ other counsel, to which I—— (Interrupted.)

The Court: Well, the Court will consider that and rule on it soon, Mr. McNealy.

Mr. McNealy: Thank you.

Mr. Stevens: Your Honor, we oppose this motion for a continuance and call the Court's attention to

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

the fact that Mr. McNabb's associate is now Mr. Gore. Mr. Gore was previously Mr. McNealy's associate. Mr. McNealy, it is true, had probably not consulted with Hutson on this case because Mr. Gore handled it. On the 14th day of April, 1954, Mr. Gore handled the preliminary hearing on this matter as the record of the bind-over will show, and he has represented Mr. Hutson through the proceedings. He is now with Mr. McNabb and the idea that a continuance can be had merely because Mr. McNabb has not seen Mr. Hutson does not meet with the government's approval. Mr. McNabb, as the Court realizes, has been in Juneau with the legislature and if Mr. Hutson wishes to continue with his representation through Mr. Gore's services or through the services of some one other than Mr. McNealy, we believe he should have done so at this time. I call attention to the fact that Mr. McNealy was also in Juneau at the legislature [4] and returned here only recently and for that reason obviously has been unable to contact his client. However, Mr. Hutson was informed of the setting of this trial and also we believe that Mr. Gore is fully familiar with it having handled the preliminary hearing and being Mr. McNabb's associate and being present in court at the present time shows that the continuation of counsel and the awareness of counsel as to what the issues of the case are and being able to properly present the defense, the contention that the motion, that counsel would not be able to do so is without merit and if the Court wishes to call Mrs. Nordale to support our statement, we would be

pleased to do so. We have obviously not been able to prepare a reply to this as it was served on my office at approximately ten o'clock. We think that Mr. Hutson's rights are adequately protected in view of the fact that Mr. McNabb's associate is Mr. Gore, and Mr. Gore is here and Mr. Gore, as anyone will tell you, adequately represented Mr. Hutson in the Commissioner's Court at the preliminary hearing.

The Court: Mr. McNabb.

Mr. McNabb: May it please the Court, it will not be necessary for the Court to disbelieve that Mr. Gore represented this defendant at the preliminary hearing. However, I do not believe that there is necessarily any correlation between the representation that Mr. Gore gave this defendant at the preliminary hearing and the fact that he has [5] now employed me to represent him, I am the one who is responsible for the proper defense of this man and I have accepted employment. The mere fact that there is an employee, employer relationship presently existing between Mr. Gore and myself does not necessarily mean that I am familiar with everything that is in his mind. By the same token that he has in fact interviewed the witnesses that we propose to call, if we can contact them in this matter, I am not charged with that knowledge. I have not contacted them. I saw this man Wednesday, or Saturday afternoon at three o'clock. And about three-thirty I agreed to handle this matter for him. And I asked him then to make a diligent effort Saturday after-

noon and evening and Sunday to contact the various witnesses that I thought might be advisable to call and I made an appointment with him and with his witnesses, those of them that he could find, for eight o'clock last evening in my office. The defendant came there, your Honor, but he did not bring any witnesses with him. This morning when I arrived at my office is the first time that I had had an opportuntiy to see the indictment. I did not even know precisely what I was called upon to defend.

Now, if we have witnesses, if we are able to contact any of them and I made a telephone call last night in an effort to find one, it seems to me in view of the gravity of the charge here today that the interests of justice can only be served by granting me a sufficient length of time in which to at least [6] contact and interview the witnesses that this defendant has recommended that I interview so that I may then be able to determine whether or not their testimony would be of benefit or advantage to the defendant.

It has been manifestly impossible for me to examine either the law or any witnesses and I feel, therefore, that I am totally unprepared to properly defend this man.

The Court: The motion for continuance was filed at ten o'clock this morning, presented to the Court at ten, the very hour that the jury reported here to start the trial of the case. If some extraordinary happening had taken place and a proper showing made to the Court that that extraordinary happening, the Court would not hesitate to grant

the continuance, but that doesn't seem to be the situation here. If there is any reason the defendant has not, is not ready for trial it is because of his own doing. The defendant has known for a long time, having been arraigned January 18th, that his case was going to be tried. The trial of it was delayed because his counsel, Robert J. McNealy, was in the legislature and the Court was pleased to grant the extension of time for that reason and has done that in many cases, in all cases in fact where the defendant has said he is represented by one of the attorneys attending the legislature. I have gone right along with that, and that was done in the case of Mr. Hutson.

Now, his attorney for whom we have delayed the trial is back to represent him. We are ready to go ahead, the [7] case fixed for trial and at the very moment we are ready to proceed the Court is faced with a motion for continuance based only on a substitution of the attorneys that the defendant has decided, and maybe for good reasons, but they are not shown that he wants a different attorney. If the Court should grant a continuance now until the 28th, as requested by the defendant's present counsel, perhaps on the 28th the defendant will decide that he wants a different attorney and make another motion and I don't believe that can be permitted under the law and I don't believe it is necessary under these circumstances. There is no showing to the Court that Mr. McNealy, who was retained originally by this defendant, is not competent to handle the case, no showing that he is not willing to, no

showing at all for the record of any reason for wishing to dispense with the services of Mr. McNealy.

I believe it is for the defendant to determine at this time what attorney or attorneys he wishes to represent him and the trial will proceed. The motion is denied. You will observe that the Court has not released Mr. McNealy as yet. That is a decision for the defendant to make, who he wishes to represent him under these circumstances. If the defendant decides that he wants me to release Mr. McNealy, I will grant Mr. McNealy's motion to be released, but if he wishes to retain the counsel who he has relied on he may do so. [8]

Mr. McNabb: May we then at this time have a five minute or a ten minute recess so we may discuss this matter?

The Court: Certainly. We will take a ten minute recess. It is now seventeen minutes past ten.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 10:17 a.m., the court took a recess until 10:25 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Let the record show the presence of the defendant. The defendant ready to proceed?

Mr. Stevens: Mr. McNabb just stepped out, your Honor.

The Court: Mr. Hall.

The Clerk: Yes, sir.

The Court: Are there any further proceedings to be taken in the absence of the jury?

Mr. McNabb: Yes, your Honor, if I may address the Court for a moment, please.

The Court: Are there any members of the jury panel in the audience. It seems not. Very well.

Mr. McNabb: Your Honor, I submit to the Court that I would never have undertaken the defense of this matter had I not felt that there was good cause for granting of the continuance. I saw a copy of this indictment for the first [9] time this morning at fifteen minutes until ten o'clock, and I would like to have an opportunity to examine the indictment in view of the law and do a bit of research on the problem. I have suggested to Mr. McNealy that he remain in this action with me as defense counsel, as co-counsel, and he has indicated some hesitancy to do that. I think he will address the Court in that regard. I would like at least, your Honor, to be allowed a continuance in this matter until at least two o'clock so that I may examine the indictment. I have asked the defendant if he were represented by counsel at the time he entered a plea, and he has advised me that he was not. It is my present belief that we should move against this indictment, your Honor, but I would have to examine the law before I could determine the merit of such a motion. At any rate, Judge, I will now orally move the Court for a continuance until two o'clock in this matter.

The Court: I am wondering, Mr. McNabb, if per-

haps while you are looking into authorities you could delegate the selection of the jury to someone else.

Mr. McNabb: No. If the Court feels, your Honor, that we should choose the jury now, I would prefer to go ahead and do that. Perhaps that could be accomplished by twelve o'clock or so. That would give us two hours in which to——

The Court: Very well. Will you ask the members of the panel to come in, please. [10]

Mr. McNealy: If it please the Court, at this time I would like to renew my motion and possibly the defendant could make his statement. The defendant called at my office at noon Saturday, or he was waiting in my office when I returned from Court Saturday, and he told me he wished to employ counsel in view of the fact that I had been away, for possible other reasons, and stated in employing other counsel that he felt that he would have to have some indication to other counsel that he was not indebted to me for past services. I represented Mr. Hutson on a couple of occasions prior to this and arranged for bond and other matters of that kind, so I assured him since he definitely wanted other counsel I gave him a paper to the effect that he was not indebted to me; at the time he told me that he didn't have the funds to employ me for the case either and that he thought he could make financial arrangements to employ one other attorney. It is my understanding he has made some arrangements with Mr. McNabb, and I believe with the defendant's statement in Court I should prefer under all the circumstances

not to be connected with the case. In fact I think I would be kind of a fifth wheel.

Mr. Stevens: Your Honor, there are no members of the jury in here, are there? No. This motion of Mr. McNealy's I believe should be granted. This case is connected, although not directly but indirectly with the case which is pending against Mr. Gore, and I believe that in view of that [11] circumstance Mr. McNealy is in an embarrassing position being in between on this case and the case of Mr. Gore, and I believe the Court should release Mr. McNealy.

The Court: Does the defendant have any objection to the release of Mr. McNealy?

Mr. Hutson; No, sir.

The Court: Very well, the motion of Mr. McNealy to be released as counsel for Harold Hutson is at this time granted. Is there anything further to consider before the venire is called in.

Mr. McNabb: No, your Honor.

The Court: Very well.

(Thereupon, the veniremen entered the courtroom.)

The Court: Court is in session. The Clerk at this time will, please, call the roll of the venire.

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor, except Dolores Clark, Freda Driscoll, Ethel Ennis,

Joe Gannis and Byron Gillam, sir, who was excused. We have thirty-five present, your Honor.

The Court: Mr. Clerk, we will take up the matter of the absentees at the next recess.

The Clerk: Yes, sir.

The Court: Will you now select out of the box twelve jurors, calling one at a time. [12]

(At this time, Mr. Yeager made a brief statement to the veniremen and Mr. McNabb and Mr. Yeager proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above-named cause.)

The Clerk: The remaining jurors will be excused until Wednesday morning at ten o'clock.

Mr. McNabb: May it please the Court, I was going to suggest to the Court, if I may, at this time that we now continue this case until tomorrow morning at ten o'clock. I will not have an opportunity to get into the matters that I discussed with the Court before two o'clock now. I have reason to believe that it will, that one day will be a sufficient amount of time in which to try this case. I think the interests of justice and time of the jury would best be served by starting it tomorrow, if we may.

The Court: Mr. Yeager.

Mr. Yeager: Your Honor, we have brought one witness quite a long ways from his work. I believe the government would like to continue the case if possible at all, at two o'clock.

The Court: Yes, the Court was about to recess

at twelve o'clock and it was defense counsel who suggested that we continue and I will, however, recess until two-fifteen.

Mr. McNabb: Very well, sir.

The Court: Members of the jury, I admonish you now [13] not to discuss this case with anyone and do not permit anyone to discuss it with you and do not listen to any conversation concerning the subject matter of the trial; and of course, do not form or express any opinion until the case is finally submitted to you, and you are excused until two-fifteen, and the court will recess until two o'clock

The Clerk: Court is recessed until two o'clock.

(Thereupon, at 1:45 p.m., a recess was taken until 2:15 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:15 p.m., pursuant to the noon recess.)

The Court: Is the defendant, Mr. Hutson, in the room? Let the record show the presence of Mr. Hutson, and will the attorneys please approach the bench for the record.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: The Court, of course, doesn't know what evidence is going to be introduced in the trial of this case, but the language of the indictment we

can surmise what it is apt to be. What I am wondering now, and I direct this particularly to the counsel for the defendant, is what attitude if any of the defendant's counsel might have as to the exclusion of juveniles from the courtroom. The Court observes a very young man sitting in the room. Some others might come in. [14]

Mr. McNabb: Judge, so far as I am concerned, I do not know what is proposed to be introduced here, but I would have no objections to excluding every one from the courtroom and I will give the Court my word that in the event of a conviction the question will never be raised on appeal. That is what knocked out the Jelke case, the first one.

The Court: Well, I am wondering, at least as to the exclusion of minors.

Mr. McNabb: I would recommend——

Mr. Stevens: I would recommend that the Court just inform the bailiff to screen the visitors, spectators as they come in the door, find out if they are twenty-one. Otherwise I can see no reason not to allow them in.

Mr. McNabb: I think that as far as that is concerned for the matters of the protection of the very minor accusing witness that it might be embarrassing to her, though I would not know her if I saw her, but I think it would perhaps be a little less difficult on her if all of the witnesses or spectators were excused and it seems to me that I am the only one who could ever raise that issue.

The Court: That's right.

Mr. Stevens: There is also the defendant, Mr.

McNabb. I am not sure that he would be bound completely by you waiving his constitutional rights, if there is such after the Jelke decision. I haven't read it yet myself, but I have [15] heard about it and it seems there was an agreement of counsel on that case.

Mr. McNabb: It makes no difference to me.

Mr. Stevens: Would you move, is that your move that——

Mr. McNabb: I don't know what the Court's attitude is in this. I consent to anything so far as this gallery is concerned.

Mr. Stevens: All right.

The Court: Pursuant to the agreement of the defendant's counsel I now ask Mrs. Wann, the court crier, to approach anyone who appears to be less than twenty-one years of age and ask the person his or her age and if they are under twenty-one, as to that person to, please leave the courtroom and not to return during this trial.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

The Court: Do the parties stipulate that the twelve persons in the jury box are the jurors duly impaneled and sworn to try this case?

Mr. Yeager: The government so stipulates, your Honor.

The Court: Does the defendant stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case? [16]

Mr. McNabb: The defense will, your Honor.

The Court: Very well. You may proceed.

(Thereupon, Mr. Yeager presented his opening statement to the jury.)

Mr. McNabb: Defense waives.

The Court: Very well. Will counsel approach the bench?

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: It seems the Court is asleep. I usually either obtain a stipulation that a number less than twelve can return a verdict or select an alternate juror, and I didn't do it in this case and perhaps at this time the defendant doesn't wish to so stipulate. I don't want to embarrass the defendant one bit.

Mr. McNabb: We have no objection.

The Court: That a jury of less than twelve might return a verdict in the event of the disability or incapacity of one of the jury?

Mr. McNabb: Not less than eleven.

The Court: Very well then.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

Mr. Yeager: The government will call as their first [17] witness, Virginia, Mead.

VIRGINIA MEAD

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Now, would you state your name to the court and jury, please? A. Virginia Mead.

Q. And how old are you, Virginia?

A. Twelve years old.

Q. And when is your birthday?

A. February 14th.

Q. And do you go to school? A. Yes, sir.

Q. In what grade of school are you?

A. Sixth.

Mr. McNabb: Could you, your Honor, please, could we give her the microphone.

The Court: Very well, and I would like to explain to Virginia, we are going to give you something that will make your voice carry better in the room.

The Clerk: Virginia, you can talk to that, just close or far, just so you can, a little closer than that.

Miss Mead: Like this. [18]

Q. (By Mr. Yeager): Now, Virginia, what grade are you in? A. Sixth.

Q. Do you know what you have just taken when you raised your right hand? A. Yes, sir.

Q. What was that?

A. It is an oath to tell the truth.

Q. And do you know what happens if you do not tell the truth? A. No, sir.

(Testimony of Virginia Mead.)

Q. Have you been taught to tell the truth?

A. Yes, sir.

Mr. McNabb: I object to that.

The Court: Will you ask her if she knows what truth is and what lieing is?

Q. (By Mr. Yeager): Virginia, do you know what the truth is? A. Yes.

Q. And what is that?

A. Well, it is to tell, to tell when something really happened.

Q. And do you know what a falsehood is?

A. Yes.

Q. And what is a falsehood?

A. A lie. [19]

Q. And how old were you on March 20th?

Mr. McNabb: Just a moment now. I am going to object to any further questions until such time as the little girl is properly qualified, until it is fully shown that she understands the obligations of an oath.

The Court: The government may pursue it a little further.

Mr. McNabb: George, ask her if she knows what God is?

Q. (By Mr. Yeager): Did you know beforehand what an oath is? A. Yes.

Q. And who do you swear that oath to?

A. To God.

Q. And do you know who God is? A. Yes.

Q. And who is that?

A. He is the Creator of all mankind.

(Testimony of Virginia Mead.)

Mr. McNabb: I withdraw the objection.

The Court: Very well. Proceed.

Q. (By Mr. Yeager): How old were you on March 28th, 1954? A. Eleven years.

Q. And where did you live on March 28th, 1954?

A. 506, no, I think it was 508 Sixth in Hamilton Acres.

Q. And do you have any neighbors? [20]

Mr. Stevens: Speak up, Mr. Yeager.

Q. (By Mr. Yeager): Do you have any neighbors, Virginia? A. Yes.

Q. Who are those neighbors if you know, please?

Mr. McNabb: Just a moment now, I object to that question on the grounds it has no bearing on the issues of this case.

The Court: Sustained.

Q. (By Mr. Yeager): Do you know the defendant, Harold Hutson, Virginia? A. Yes, sir.,

Q. And did you know him on March 28th, 1954?

A. Yes.

Mr. McNabb: I object to that, move the answer be stricken, no proper foundation is laid for it.

The Court: Overruled.

Q. (By Mr. Yeager): And do you know where Harold was on March 28th, 1954? A. Yes.

Q. Where was Mr. Hutson, Virginia?

A. He was over at our house.

Q. What time was he there, if you know, Virginia? A. I don't know.

Q. Who else was present at that time?

A. Joe Baird. [21]

(Testimony of Virginia Mead.)

Q. And who is Joe Baird?

A. Well, do you mean when this thing happened?

Q. That is correct.

A. Well, no, he wasn't there.

Q. Who wasn't there? A. Joe.

Q. Joe Baird? A. Yes, sir.

Q. Now, when did this thing happen?

Mr. McNabb: Now, just a moment, I am going to object to that as being vague, no bearing on the issues of this case, no proper foundation laid for it.

Mr. Yeager: I will reword the question, your Honor.

The Court: Very well, sustain the objection.

Q. (By Mr. Yeager): Now, were you home on the evening of March 28th, 1954, Virginia?

Mr. McNabb: I am sorry. I didn't understand that question. I couldn't hear you.

Q. (By Mr. Yeager): Were you home on March 28th, 1954? A. Yes.

Q. And what if anything took place that evening? A. Pardon?

Q. What if anything took place that evening?

A. You mean did anything take place? [22]

Mr. McNabb: I am going to object to that question, vague, having no bearing on the issues, no proper foundation.

The Court: I am going to permit her to answer.

Q. (By Mr. Yeager): Will you tell us what happened, please?

(Testimony of Virginia Mead.)

A. Well, I was over at our neighbors, Frank Perry, and I was——

Mr. McNabb: Just a moment, I am going to object to that answer and move that it be stricken on the grounds it is not responsive to the question.

The Court: Overruled.

Q. (By Mr. Yeager): Continue, please.

A. All right. I broke an "E" string and Mr. Hutson said that he would take me down town to get another and I told him I wouldn't go unless Joe came with us, and so Joe came with us and then Joe said that he knew him so Joe had been drinking and we went down town and got the string and then Joe, they got some more whiskey and they were drinking.

Mr. McNabb: Now, just a moment. Excuse me, honey. I am going to object to that entire answer, move that it be stricken on the grounds it is not responsive to the question, has no bearing on the issues involved here, narrative form.

The Court: Of course, the court has in mind the age of the witness, but at the same time I feel counsel, that you can develop the facts even from this twelve year old [23] witness in a little better manner. It may be difficult, Mr. Yeager, but let's try to proceed by more direct questions and answers.

Mr. Yeager: Would the court permit leading questions due to the age?

The Court: To a certain extent and subject to objection. I will give more latitude and leeway to this witness than I would an ordinary witness.

(Testimony of Virginia Mead.)

Q. (By Mr. Yeager): Now, approximately——

Mr. McNabb: Just a moment. For the clarity of the record, your Honor, was my objection to striking that answer on the grounds that I gave sustained?

The Court: Sustained.

Mr. Yeager: Striking the whole testimony, your Honor?

The Court: I would like if counsel can do it to see if this can be unfolded and unfolded in a clearer manner and if that can't be done I may permit far more latitude. I would like to have you attempt it, go back and start up again.

Q. (By Mr. Yeager): Will you state who was present that evening?

A. The whole evening?

Mr. McNabb: I object to that question as being again too vague, having no bearing on the issues of this case, no proper foundation laid for it. [24]

The Court: Overruled and proceed, counsel, and try to bring out if you can, see, the witness has testified to some Joe Baird going along and drinking and let's see if, and that has been stricken. Now, let us see if you cannot establish where they were, what happened, who was there, with this witness.

Mr. Yeager: All right.

Q. (By Mr. Yeager): Now, who was present at your home at that time, that evening on March 28th, 1954?

A. Just Joe Baird, my little sister.

Q. And who else?

(Testimony of Virginia Mead.)

A. No one else. Oh, Harold.

Q. And who do you mean by Harold?

A. Mr. Hutson.

Q. What time was this in the evening, approximately, Virginia?

Mr. McNabb: Just a moment. I couldn't hear you.

Q. (By Mr. Yeager): What time was this approximately that evening, Virginia?

A. I don't know.

Q. Was it in the evening? A. Yes, sir.

Q. Will you state whether or not that night that you left the house? [25]

Mr. McNabb: Just a moment. I am going to object to that as leading and suggestive.

The Court: Overruled.

Miss Mead: Yes, I was.

Mr. McNabb: She was what. I object to that and move that it be stricken on the grounds that it was not responsive.

The Court: Sustained. Are you all right, Virginia?

Miss Mead: Yes, sir.

Q. (By Mr. Yeager): Now, Virginia, when did you see Mr. Hutson on that day?

A. Well, I saw him in the early part of the evening.

Q. And what, if anything, did you do then?

A. Pardon?

Q. What if anything did you do then?

A. We, what do you mean?

(Testimony of Virginia Mead.)

Q. When you saw the defendant, Mr. Hutson?

A. Over at Frank Perry's house.

Mr. McNabb: I am sorry. I couldn't understand the witness, your Honor.

The Court: Do you want her answer read, Mr. McNabb? Mrs. Templeton, will you read the answer?

(Thereupon, the reporter read the answer.)

Q. (By Mr. Yeager): Now, Virginia, will you state whether or not you [26] left Frank Perry's house? A. Yes, I did.

Q. And where did you go from there, if any place?

A. Well, we stopped over at our house to see if Joe was there, and he wasn't there. He was down at the store, and then we went to the music shop and got my "E" string.

Q. And where was that at?

A. That was——

Q. Where was the music shop?

A. Well, it was by the Nordale.

Q. And where did you go, if any place, from there? A. We came back home.

Q. And who was with you then?

A. Harold Hutson and Joe Baird.

Q. And what, if anything, took place after that?

Mr. McNabb: Now, I am going to object to that, your Honor, until the relevancy of the question is established.

The Court: Overruled.

(Testimony of Virginia Mead.)

Miss Mead: What was that question again?

Q. (By Mr. Yeager): What if anything took place after that?

A. Well, Joe had been drinking and he went out to get some, he got pretty drunk and so I went over to Marian Perry's house, and she said I could stay over night there but I was afraid to leave my sister alone.

Q. And did you, will you state whether or not you came [27] back from Perry's house to your own house?

Mr. McNabb: Now, just a minute, I object to that as leading and suggestive, no bearing on the issues.

The Court: Overruled. She may answer.

Miss Mead: Well, I snuck back to my room and I went to bed. My sister came to bed with me.

Q. (By Mr. Yeager): And what happened after you went to bed?

A. Well, Mr. Hutson came in our room.

Q. And what happened then, Virginia?

A. And then he asked me to kiss me, and I said I didn't want to and then he kept telling me to and I kept telling him I didn't want to, and I told him to go home but then Joe Baird was, had gone out to get some more whiskey and he said that he couldn't leave until he got his car back, and so he got mad and he kept telling me to kiss him and then I told him no, and he said he had a gun and he wanted me to put my mouth on his thing.

Q. And what happened then?

(Testimony of Virginia Mead.)

A. And then I did it and then I asked him for a drink of water and thought I might go out the back door, but he wouldn't let me. I never got to, and then I ran out the front door over to Marian's house.

Q. Now, who, what do you mean by Marian's house? A. Marian Perry.

Q. And what do you refer to as "his thing"? [28]

A. His penis.

Q. Will you state whether or not he put that in your mouth? A. He did.

Q. And what did you do after you got to the Perry's house?

A. Well, I was banging on the door and then they let me in and I told them what happened and Mr. Perry went out and he was going to, he had a crowbar and he was real mad and he was going over to Mr. Hutson's house. He lived right next to Mr. Perry.

Q. Now, Virginia, in different parts of your testimony you have referred to an "E" string?

A. That is the highest string on a violin.

Q. And do you play the violin?

A. Yes, sir.

Q. How long have you played the violin?

Mr. McNabb: I am going to object to that as having no bearing on the issues of this case.

The Court: I don't see the materiality, but I will let her answer.

Miss Mead: Well, I have been playing for three years, three school terms.

(Testimony of Virginia Mead.)

Q. (By Mr. Yeager): Now, Virginia, how long were you and Mr. Hutson in your bedroom? [29]

A. I don't know.

Mr. McNabb: Just a moment, I object to that until there is some proper foundation laid for it.

The Court: Overruled.

Miss Mead: Well, I don't know exactly.

Q. (By Mr. Yeager): Well, was it a long period or a short period?

A. Well, it seemed pretty short to me, about twenty minutes. No, not that long.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: May we have a recess at this time, your Honor?

The Court: Yes. Members of the jury, once again it is my duty to admonish you that you shall not discuss this case with anyone; not permit anyone to discuss it with you; not to listen to any conversation concerning the case now on trial; and do not form or express any opinion until the case is finally submitted to you. Take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Let the record show the presence of the defendant and his counsel. The parties stipulate that the twelve persons in the box are the jurors

(Testimony of Virginia Mead.)

duly impaneled and [30] sworn to try this cause?

Mr. McNabb: The defense will so stipulate.

Mr. Yeager: The government so stipulates, your Honor. May it please the Court, the government at this time would like to have permission to reopen direct to ask a few more questions to clarify.

The Court: Permission granted.

VIRGINIA MEAD

the witness under examination at the time the recess was taken, resumed the stand for further direct examination.

By Mr. Yeager:

Q. Virginia, you talked about Joe Baird?

A. Yes.

Q. Who is Joe Baird?

Mr. McNabb: Just a moment. I am going to object to that as having no bearing on the issues of this case.

The Court: She may answer.

Miss Mead: Well, a long time ago mother was real sick and he called a doctor and he was a good friends of ours and everything and we sort of just adopted him for Uncle Joe.

Q. (By Mr. Yeager): What did he do for you children?

A. Mother went to McKinley Park and he was taking care of us kids.

Q. Now, when this act occurred in your bedroom, was Joe Baird there at that time? [31]

(Testimony of Virginia Mead.)

A. No.

Q. Who was there at that time?

Mr. McNabb: I object to that as having already been gone into. Repetitious.

The Court: It is repetitious, but she may answer.

Miss Mead: Well, just Mr. Hutson, my little sister, and I.

Q. (By Mr. Yeager): How old is your little sister?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: She may answer.

Miss Mead: She is five years old.

Q. (By Mr. Yeager): Will you state whether or not you did see a gun at that time?

Mr. McNabb: I object to that as being leading and suggestive and having no bearing on the issues of the case.

The Court: She may answer. Overruled.

Miss Mead: Well, I didn't see any gun.

Q. (By Mr. Yeager): When did Mr. Hutson make that statement to you?

Mr. McNabb: Just a minute. I object to that as being vague, indefinite, calling for a conclusion, no proper foundation laid for it, not within the issues.

The Court: Overruled. She may answer. [32]

Miss Mead: Well, he, at first he said it in the bedroom. He, Mr. Perry said that he told him he had a gun, too.

Mr. McNabb: Just a minute, I object to that as hearsay.

(Testimony of Virginia Mead.)

The Court: Sustained.

Mr. McNabb: Move the answer be stricken.

The Court: It will be stricken.

Q. (By Mr. Yeager): Virginia, can you remember what you said to Mr. Hutson in the bedroom? A. No, sir.

Q. You can't remember what you said?

A. No.

Q. Can you remember what Mr. Hutson said to you? A. Well, no.

Q. Will you state whether or not you were afraid when he was in the room?

Mr. McNabb: Just a minute. I object to that as calling for a conclusion, no proper foundation laid for it, not within the issues of this case.

The Court: Overruled.

Miss Mead: Well, I was.

Q. (By Mr. Yeager): And why were you afraid?

Mr. McNabb: Same objection. [33]

The Court: Same ruling.

Miss Mead: Well, I don't know. I am just not used to men coming into our house and doing that.

Q. (By Mr. Yeager): Now, Virginia, where were you when Mr. Hutson put his penis in your mouth? A. We were——

Mr. McNabb: I object to that as being repetitious.

Miss Mead: We were in our living room.

Q. (By Mr. Yeager): And where were you?

(Testimony of Virginia Mead.)

A. We were, I was on the davenport.

Q. And where was Mr. Hutson?

A. He was there, too.

Q. What actually did he do at that time?

Mr. McNabb: Just a minute. I am sorry. Will you, please, read the question.

(Thereupon, the reporter read the question.)

Miss Mead: We were on the davenport.

Q. (By Mr. Yeager): Yes.

A. Well, he made me put his thing in my mouth.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: We have no questions.

The Clerk: That is all, Virginia.

(Witness excused.) [34]

Mr. Yeager: The government will call Mrs. Perry.

MARIAN W. PERRY

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Will you state your name to the Court and jury, please? A. Marian W. Perry.

Q. And where do you live, Mrs. Perry?

A. 512 Sixth Street, Hamilton Acres.

Q. And where is that located?

A. That is located north of Fairbanks sort of northeast, I believe.

(Testimony of Marian W. Perry.)

Q. And where is Fairbanks located?

A. In Alaska.

Q. And will you state whether or not you were living there on the 28th, on March 28th, 1954?

A. I was.

Q. Will you state whether or not you know a little girl by the name of Virginia Mead?

A. I do.

Q Will you state whether or not you know where she lived at that time?

A. Yes, she lived at, I believe the number was 508 Sixth Street, Hamilton Acres. [35]

Q. Mrs. Perry, I call your attention to March 28th, 1954; will you state whether or not you saw Virginia Mead on that day? A. I did.

Q. And what time, approximately, Mrs. Perry?

A. March 28th was a Sunday, was it not?

Q. Correct.

A. I believe it was about one o'clock in the morning was the first time I saw Virginia.

Q. And where did you see her?

A. She was at my front door.

Q. What was taking place at that time, if anything?

A. Well, I was in bed and asleep, my husband and I, and I was awakened by some loud knocking and some screaming and talking and I got out of bed and ran downstairs to the door and opened it and she came in.

Q. And what was her physical appearance at the time she came in, Mrs. Perry

(Testimony of Marian W. Perry.)

A. Well, she came in, she was barefooted, and she had no outer wraps on, no hat. She was in rather disheveled appearance and she was crying and in a hysterical state of mind.

Q. Will you state whether or not she made a statement to you at that time?

A. Yes, she did. She——

Mr. McNabb: Just a minute now. I am going to [36] object to any further testimony.

Q. (By Mr. Yeager): What was that statement she made to you, Mrs. Perry?

A. She said, "He tried to make me do it and it was awful."

Q. What did you do after that, Mrs. Perry?

A. Well, I believe about this time my husband came downstairs, and——

Q. And what, if anything, did your husband do at that time?

Mr. McNabb: I object to that as being not the best evidence, calling for a conclusion, not within the issues of this case.

The Court: She can state if she knows.

Mr. McNabb: No proper foundation laid for the question.

The Court: She may answer.

Mrs. Perry: What was the question again, please.

Q. (By Mr. Yeager): What, if anything, did your husband do at that time?

A. Well, he came downstairs and he was, in-

(Testimony of Marian W. Perry.)

quired as to what happened. May I state something that I heard when I came downstairs at the time I let Virginia in?

Mr. McNabb: Now, just a minute, I object to any voluntary statement.

The Court: Sustained, and you will proceed by question and answer. [37]

Mr. Yeager: Yes.

Q. (By Mr. Yeager): Will you state whether or not you have anything else to add to your previous question?

Mr. McNabb: Now, just a moment. I object to that as general, vague, not within the issues of this case, attempting to elicit information from the witness without knowing what is, without giving us an opportunity to object to it before he asks a question.

The Court: Sustained, and counsel proceed.

Q. (By Mr. Yeager): I believe previous you testified, Mrs. Perry, that you were coming downstairs, who was present at that time?

A. My husband and children were the only ones in the house when I came downstairs, when I heard the noise and the screaming.

Q. And where was your husband?

A. He was upstairs in bed.

Q. And where were the children?

A. Well, my baby who was six weeks old at the time was sleeping upstairs and my little boy was sleeping downstairs in his bedroom.

(Testimony of Marian W. Perry.)

Q. What, if anything, did you do upon descending the stairs?

A. Well, when I came down the stairs to let Virginia in I heard this man say—— [38]

Mr. McNabb: Just a minute, I object to that as being not responsive to the question.

The Court: She may answer.

Mr. McNabb: He asked what she did.

The Court: Overruled.

Mrs. Perry: I heard this man say, "What do you want to go in and bother them for, honey?"

Mr. McNabb: I object to that and move that the answer be stricken as being not responsive to the question.

The Court: Overruled.

Q. (By Mr. Yeager): Mrs. Perry, did you know Virginia before this particular evening?

A. Yes.

Mr. McNabb: Move the answer be stricken on the grounds it is repetitious.

The Court: Overruled.

Q. (By Mr. Yeager): Do you know her parents?

A. I knew her mother. I know her mother, yes.

Q. Will you state whether or not you knew where her mother was at this time? A. I did.

Q. And where was her mother?

A. Her mother was up at Mt. McKinley.

Q. Mrs. Perry, will you state whether or not you know [39] the defendant, Harold Hutson?

A. I do.

(Testimony of Marian W. Perry.)

Q. Did you know him at that time?

A. Yes.

Q. Did you know where Mr. Hutson lived?

A. Yes, he lived next door to us. I believe the address was 516 Sixth Street.

Q. Will you state whether or not you saw Mr. Hutson that evening?

Mr. McNabb: Just a moment. I am going to object to that until he makes the question more specific.

The Court: Sustained.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: No questions.

The Clerk: That's all, Mrs. Perry.

(Witness excused.)

Mr. Yeager: Your Honor, things have moved so rapidly here that the government would ask for about twenty minutes until we get the next witness.

The Court: Very well. Members of the jury, once more I admonish you not to discuss the subject of this case with anyone; not to permit anyone to discuss it with you and not to listen to any conversation concerning the subject of this trial; and not to form or express any opinion until the case is finally submitted to you. We will take a twenty-minute recess. [40]

The Clerk: Court is at recess until a quarter till four.

(Thereupon, at 3:25 p.m., the court took a recess until 3:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel. Do the parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. McNabb: We so stipulate, your Honor.

Mr. Stevens: The government so stipulates, your Honor. Call Mr. Perry.

The Court: Very well.

FRANK B. PERRY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. What is your name, please?

A. Frank B. Perry.

Q. Where do you live, Mr. Perry?

A. 512 Hamilton Acres.

Q. What do you do?

A. Well, I am a carpenter by trade.

Q. Do you know Virginia Mead? [41]

A. Yes, I do.

Q. You know Mr. Hutson, the defendant in this case? A. I do.

Q. How long have you known Mr. Hutson?

(Testimony of Frank B. Perry.)

A. Oh, roughly I will say just about a couple of months before this incident came up.

Mr. McNabb: I move that that answer be stricken as having no bearing on the issues of this case.

The Court: Trying to establish the time, I believe it can be done in a more concrete way. I will sustain the objection.

Q. (By Mr. Stevens): Calling your attention to approximately the 28th day of March, 1954, did you know Mr. Hutson at that time?

A. I believe so.

Q. And would you tell us how long you had known him before that time?

A. Well, the wife went into the hospital about the 12th, and Davey, that's my youngest boy, was born about the 13th and that is about the first time I met Hutson.

Q. Of what month? A. Oh, February.

The Court: Establish the year, counsel.

Mr. Stevens: Yes, your Honor.

Q. (By Mr. Stevens): What year was [42] that? A. Well, it was fifty, '54.

Q. Now, Mr. Perry, did you see Virginia Mead on the evening of the 28th of March, 1954?

A. Yes, I believe I did. I believe she was over to the house that day.

Q. Did you see her later on in the evening?

A. No, I didn't.

Q. Were you at home that evening?

A. Yes, I was home all that day, yes.

(Testimony of Frank B. Perry.)

Q. Well, did you see Virginia Mead that evening or early the next morning?

A. Yes, umm-hmm.

Q. And about what time was that?

A. Oh, that is pretty hard to say. It is quite a long ways away from now, but she was over to the house most of the time on account of Davey and she used to come in, run in, well, she would come over there and take care of the kid, run in and out all the time.

Q. Well, do you remember an evening when she came to your house late at night?

Mr. McNabb: Now, I object to that as being leading and suggestive and have no bearing on the issues of this case.

The Court: Overruled.

Mr. McNabb: No proper foundation laid for it.

The Court: It is preliminary and he may [43] answer.

Mr. Perry: Well, I don't know how to answer that one. She used to come over to the house quite a bit and take care of Davey, used to play with her and so forth.

Q. (By Mr. Stevens): Do you remember an evening when Miss Mead came over to your house and you saw Mr. Hutson the same evening?

A. Well, I couldn't very well answer that one because Mr. Hutson came over there several times and Mrs. Mead wasn't over there because as far as I could think of, she never came over to the house while I was there.

(Testimony of Frank B. Perry.)

Q. You don't remember then at this time Miss Mead coming to your house late at night?

A. She never has as far as I can recall.

Q. Do you recall testifying in the Commissioner's Court in connection with Mr. Hutson?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: He may answer.

Mr. McNabb: Government's witness, leading and suggestive questions, no proper foundation is laid for it.

The Court: He may answer.

Mr. Perry: Well, I don't know how to answer that one.

Q. (By Mr. Stevens): The question is, do you recall testifying in the Commissioner's Court, taking the stand in connection with a [44] case against Mr. Hutson? A. Yes, I can recall that, yes.

Q. Do you remember the evening that was in question downstairs when you were on the stand?

A. Yes, I can recall that.

Q. Now, recalling that evening, do you remember testifying about seeing Miss Mead?

A. Well, Miss Mead wasn't down there, but I recall Virginia being out there.

Q. Well, isn't that the name you know this little girl by, Virginia Mead?

A. That is what I know her by is Virginia Mead, yes.

Q. Now, with that refreshing of your recollection, do you recall Miss Mead coming to your house

(Testimony of Frank B. Perry.)

late at night during that evening of March of 1954?

Mr. McNabb: I object to that as leading and suggestive.

The Court: Overruled. He may answer. You are asked if you recall it.

Mr. Perry: Yes, I recall it, just trying to figure out how to answer that.

Q. (By Mr. Stevens): The answer is yes or no.

A. Yes.

Q. If you recall it, what time was it when she came?

A. Oh, roughly I will say around twelve-thirty or [45] one o'clock in the morning, roughly.

Q. Where were you when she came?

A. I was in bed.

Q. Did you go to the door?

A. The wife got to the door before I did.

Q. How did you happen to go to the door yourself, what made you go to the door?

A. Well, the, we heard this screeching and screaming at the door and naturally the wife being closer to the door than I was, she got up first and she came down there and naturally I was right behind her, not a stich of clothes on, and she opened the door and Virginia come in and she was screeching and hollering and everything.

Q. Now, just a minute. Who was at the door. You just said Virginia Mead, is that correct?

A. That's right.

Q. Was there anyone else there? A. Yes.

(Testimony of Frank B. Perry.)

Q. How do you know there was someone else there? A. Recognized a voice.

Q. Did you hear a voice? A. Yes.

Q. And you state you recognized the voice?

A. Yes.

Q. Whose voice was it?

A. Harold Hutson. [46]

Q. Did you hear what the voice was saying?

A. Yes, sir.

Q. What was said?

A. Said, "What do you want to bother these people for at this time of night for, honey?" exact words.

Q. And what did you do at that time?

A. Well, I was downstairs and I was, oh, just a little bit burned up and told the wife to go upstairs and get my pants and I put on my pants and I grabbed ahold of a crowbar which happened to be next to the door. I happened to be doing a little work around the house previous to that and I grabbed ahold of the bar and ran after Harold and by the time I got over there I kind of cooled off just a little bit.

Q. You went to Mr. Hutson's home?

A. Yes.

Q. Where is that in relation to your home?

A. Next door.

Q. What did you do when you got there?

A. Well, I had the crowbar over my head and was ready to let him have it, and kind of cooled down just a little bit and I also told him, heck, I

(Testimony of Frank B. Perry.)

will let the Highway Patrol take care of you and I turned around and left.

Q. Where was he when you got there?

A. Let's see, five, we lived at 512. I believe it was about 518 Sixth, something like that.

Q. No, where was Mr. Hutson in the house when you got there? [47]

A. He was in bed covered up.

Q. Did you see him in bed?

A. He was in bed.

Q. Did you state you threatened him?

A. I did. I will admit that. I threatened him.

Q. What happened at that time?

A. Nothing.

Q. Did you hit him? A. No, I didn't.

Q. Why didn't you?

Mr. McNabb: Now, just a minute, I object to this entire line of questioning on the ground it has no bearing on the issues of this case, not within the issues.

The Court: He may answer.

Mr. Perry: I would still like to know why I didn't.

Q. (By Mr. Stevens): Did Mr. Hutson say anything to you at that time?

Mr. McNabb: I object to that as not being responsive and move that that answer be stricken.

Mr. Stevens: We will stipulate it may be stricken.

The Court: It may be stricken.

(Testimony of Frank B. Perry.)

Q. (By Mr. Stevens): Did Mr. Hutson say anything to you when you were in this bedroom?

Mr. McNabb: I object to that as having no bearing on the issues of this case. [48]

The Court: He may answer.

Mr. Perry: No, he didn't when you come right down to it.

Q. (By Mr. Stevens): Now, what did you do when you first got to his house?

Mr. McNabb: Same objection.

The Court: Overruled.

Q. (By Mr. Stevens): What did you do when you first got to Mr. Hutson's house, Mr. Perry.

A. Well, I had that crowbar in my hand and he was in bed all covered up, and I had it over my head here just about ready to let him have it and oh, I don't know, I just kind of cooled down, whatever you want to call it. I accused him of it. He didn't deny it, didn't admit to it or anything.

Mr. McNabb: I object to that and move that the answer be stricken on the ground it is not responsive.

The Court: Not responsive. It may be stricken.

Mr. Stevens: The whole answer is stricken, or the part that was not responsive?

The Court: The part that was non-responsive.

Q. (By Mr. Stevens): Now, after you raised this crowbar, did Mr. Hutson say anything to you?

A. No, he didn't. [49]

Q. Did you say anything to Mr. Hutson?

A. Well, yes, I did in a sense of the way. I told

(Testimony of Frank B. Perry.)

him that any man that would pull a stunt like that ought to have his——

Q. Never mind, Mr. Perry.

A. You probably have the idea.

Q. Do you clearly remember everything that went on in Mr. Hutson's house at this time?

A. Well, not all of it. I can just about recall what happened in the house and after the, after he left but I don't know what happened after he left the house. Well, I can't give you no testimony on that.

Q. Would you tell us whether or not you saw Mr. Hutson's clothes anywhere as you entered the room? A. Well, he, he was in bed covered up.

Mr. McNabb: I am going to object to that question as having no bearing on the issues involved in this case.

The Court: He may answer. Overruled.

Q. (By Mr. Stevens): Just answer that question, will you tell us whether or not you saw Mr. Perry's clothes, Mr. Hutson's clothes as you entered that room? That calls for a yes or no answer.

A. I didn't see no clothes, period.

Q. Was there any discussion, will you tell us whether or not there was any discussion which pertained to a gun? A. Yes, yes. [50]

Mr. McNabb: I object to that and move that the answer be stricken as having no bearing on the issues of this case.

The Court: It may stand.

(Testimony of Frank B. Perry.)

Q. (By Mr. Stevens): Who did you have that discussion with?

A. Well, Virginia made a remark that night she made a remark that Harold——

Q. Just a minute. Directing your attention to the time when you were in Mr. Hutson's house, did you hear the mention of a gun? A. Yes.

Q. And who was there in that house at that time?

A. Well, there is, oh, I don't know, they had some roomers in there and they had the bed just about kitty-corner from Harold's bed and he made a remark that if, something about you give me hard trouble or something like that, I have got a 25 automatic under the pillow. That is when I was standing over him with a crowbar.

Q. And who said that? A. Harold did.

Q. Now, what did you do after that?

A. Well, I won't argue with an automatic. I just turned around and went out and called a highway patrol and tell them to come up there.

Mr. Stevens: Your witness, Mr. McNabb. [51]

Mr. McNabb: No questions.

Mr. Stevens: Thank you, Mr. Perry.

The Court: That's all, Mr. Perry.

(Witness executed.)

Mr. Yeager: The government rests, your Honor.

Mr. McNabb: May it please the court, we would like to be heard out of the presence of the jury, if we may, please.

The Court: Certainly. Members of the jury, once more the Court admonishes you not to discuss this case with anyone; not to permit anyone to discuss it with you; not to listen to any conversation concerning the subject of this trial; and not to form or express any opinion until the case is finally submitted to you. You are excused for at least ten minutes and we will send for you when they are ready for you.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: If it please the Court, it might be advantageous to Court and jury as well as to the defense in this matter if we could present this argument tomorrow at ten o'clock so that we might then be better able to present the authorities. We have had no time, as the Court knows, to thoroughly research this matter. We have done our best to take advantage of the various recesses that we have had. [52]

The Court: Do you suppose you could present it at nine o'clock tomorrow morning?

Mr. McNabb: If it please the Court, I think you have another argument at nine o'clock, your Honor.

The Court: I do.

Mr. Stevens: We would be pleased to contact Mr. Hurley and have that heard this evening, or

else tomorrow if you wish to go ahead at nine o'clock.

The Court: If Mr. Hurley and Mr. Hepp would agree to hear that argument at some other time I would like to hear this argument. I would be willing to give counsel from now until nine o'clock tomorrow morning.

Mr. McNabb: I can suggest to the Court that there is no question whatever of our ability to finish this case tomorrow. The thirty minutes or an hour that it will take on this argument, be it at nine o'clock or ten o'clock would certainly not, as far as I am concerned, throw the Court's calendar out of joint.

The Court: Well, I have in mind that if we hear that argument at ten o'clock tomorrow morning, how long is it going to take to dispose of the argument?

Mr. McNabb: It won't take us more than thirty minutes, Judge, if that long.

The Court: I might ask the jury to report at ten o'clock tomorrow morning, give us a half hour to take care of the argument. [53]

Mr. McNabb: I think fifteen minutes would serve adequately for the defense.

The Court: How many witnesses, if you care to state, Mr. McNabb, do you expect to call for the defense?

Mr. McNabb: Your Honor, as I mentioned this morning, I have had no opportunity to contact any witnesses.

The Court: Well, but you seem to think that we will finish tomorrow.

Mr. McNabb: I would guess that we wouldn't have more than three or four witnesses at the most.

The Court: It becomes quite important that the case be concluded tomorrow if we are going to lose an hour tonight. My only worry was that we do not finish tomorrow.

Mr. Stevens: Having in mind the record here, your Honor, I wish to state for the record that Mr. Gore is still in Court and he has participated with Mr. McNabb as was anticipated and he handled this matter at the preliminary hearing so we believe there has been ample opportunity to ascertain the witnesses. If the defense does not wish to state how many they will call, that is Mr. McNabb's business. But, for the record, Mr. Gore is here. He has handled this matter for over a year for this defendant, and I don't believe the time to locate witnesses is the thing that is putting the trial off.

The Court: The only thing the Court is perturbed about now is losing fifty minutes or an hour today and then [54] not finishing tomorrow. That is my only concern. I would like to allow counsel——

Mr. McNabb: I was wondering if the prosecution could possibly state how many rebuttal witnesses they intend to call.

The Court: I presume that would depend on the witnesses produced by the defense.

Mr. McNabb: I think all of the witnesses have been called whose names appear on the indictment.

It seems to me that the question is rather pertinent. If the government intends to call no further witnesses, I will give the Court my positive assurance there is no reason why this case will not go to the jury by five o'clock tomorrow evening.

Mr. Stevens: If Mr. McNabb would like to tell me who he is going to call and what they are going to testify to, I will tell him whether or not we are going to rebut their testimony, your Honor. We have no objection to a continuance, however.

The Court: Will you send for the jury, please? The Court is going to allow you the time, Mr. McNabb.

Mr. McNabb: Thank you.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury.)

The Court: Will the parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn? [55]

Mr. McNabb: We will so stipulate.

Mr. Stevens: The government so stipulates, your Honor.

The Court: Members of the jury, it is thought that we could best conserve the time of the Court and the jury and best serve the rights of the defendant by excusing you now until 10:30 tomorrow morning, and, therefore, I once more admonish you as it is my duty to do that you are not to discuss the facts of this trial with anyone; not to permit anyone to discuss it in your presence; not to talk

to anyone about it, and do not form or express any opinion until the case is finally submitted to you. You are excused until 10:30 tomorrow morning.

The Clerk: Court is adjourned until 9:00 o'clock tomorrow morning.

Be It Remembered, that upon the 19th day of April, 1955, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

The Clerk: Court is reconvened.

The Court: Mr. McNabb, before you proceed, I note that it is 10:00 o'clock. Is the defendant present?

Mr. McNabb: Well, I should rather imagine he is in the hall, your Honor. I have seen him this morning. [56]

The Court: You wish to have him present?

Mr. McNabb: No, not on this argument, unless the Court feels it is necessary.

The Court: How does the government feel?

Mr. Stevens: The verdict hasn't been rendered, your Honor. We would ask the presence of the defendant.

The Court: And Mr. McNabb, not wishing to limit your argument, but the Court is highly interested in any authorities that you might have as to whether or not it is your contention supported by authorities that Virginia Mead is an accomplice. That is one of the questions that I would like to have you cover in your argument, and also both the defense and the government to cover whether or not

if she is an accomplice where the corroborating testimony is. Those are the two things that the Court is interested in at this time.

Mr. McNabb: Well, Judge, I think, however, that this motion of ours is—may it please the Court, I would move now that the Court direct the jury to bring in a verdict of acquittal and I submit to the Court the following: I, of course, am not aware as to whether or not the Court has carefully examined the indictment, Count I of which specifically states the following, "that on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson feloniously had unnatural carnal copulation, by means of the mouth, with another person." Now, may it please the [57] Court, there has been no evidence introduced here whatever of any act on the part of this defendant that would go toward establishing the crime that is alleged here, that is by means of the mouth. I think that the natural import of that language is such that it would require proof of the government to show that this defendant did in fact place his mouth upon the person of the child, the prosecuting witness.

I was able in my search in an effort to determine the precise legal definition of the phrase "by means of" defined in the case of State against Pemberton, 104 Pacific at 556, in which the Court in construing "with," and I place quotation marks around the word "with," "with force and fear, committed the offense, was used as synonymous with 'by,' and equivalent of the expression 'by means of'." As

I said, that is State against Pemberton, 104 Pacific at 556.

What then would the indictment say if we used that judicial construction of the term? It would mean with the mouth, with the mouth. I submit to the Court that there has not been one iota, not one scintilla of evidence introduced here to support the proposition that this defendant placed his mouth upon any part of the anatomy of the female child who is the prosecuting witness for the government. That, your Honor, is the only case that I could find construing the term or the phrase "by means of."

Now, may it please, the Court, I would like to direct the Court's attention to, if the Court feels that that [58] expression, let me say this, if I may, the government may contend that there could be no sexual satisfaction, that is there could be no copulation, and copulation is defined many, many places without exception as sexual satisfaction. The government may contend in anticipation of such an argument that there could be no sexual satisfaction on the part of this defendant if he were to place his mouth upon the person of the child, and I state unequivocally to the Court that that certainly is not true. Anyone who is familiar with the Kinsey Report and many other studies of a similar nature are quite aware that in many instances that a man may have an emission by reason of placing his mouth upon the private parts of the female.

Now, then, the phrase unnatural carnal copulation, I direct the Court's attention to the definition

of the word copulation. Copulation is defined in 18 Corpus Juris Secundum at Page 130 as "the act of gratifying sexual desire." The act of gratifying sexual desire. The gratification, of course, requires emission. In this instance there was no testimony whatever of any emission. It is further defined as the consummation of marriage. By the same token, there is no consummation of marriage without emission. Further it says the word copulation is synonymous with coition, and cites 14 Corpus Juris Secundum at 1315, and at that place, 14 Corpus Juris Secundum 1315 the word coition is defined as, "The act of gratifying the sexual desire, held to be [59] synonymous with 'copulation'," and, as I stated to the Court, copulation previously defined as the consummation of marriage.

Here, your Honor, there was no testimony at all as the Court well knows concerning an emission of this defendant. Now, may it please the Court, I would like further to call the Court's attention to the case of People v. Angier, which has been cited many times, District Court of Appeal, Second District, Division 2, California, decided April 23rd, 1941, and your Honor, if I may have the Court's indulgence, I find that this case is so exceptional that I would like to read a substantial portion of this decision to the Court, if I may, please.

The Court: Very well.

Mr. McNabb: The opinion delivered by Justice Moore, the presiding Justice, and he says, "Appellant was accused by information with a violation of section 288a of the Penal Code. He was tried by

the court without a jury, was convicted and sentenced to San Quentin penitentiary. He appeals from the judgment of conviction and from an order denying his motion for a new trial. He maintains that the verdict and decision are contrary to law and against the evidence."

I am afraid, your Honor, that I have neglected to give the Court the citation of this case, 112 Pacific Second at Page 659. Judge, I don't wish to be——

The Court: I am listening very attentively. [60]

Mr. McNabb: "Abbreviating the lengthy and conflicting stories told by two little girls, aged seven and five, whom we shall refer to as AC and YZ, it is sufficient to recite that they resided in the vicinity of appellant's home and often played around his door; that appellant had a solarium above his garage which was reached by climbing a ladder and through an opening; that about the 30th day of July, 1940, the two children accompanied by AC's sister entered the solarium to play. At the same time appellant was at work in the machine shop of one Johnson, whose premises adjoined those of appellant. The children soon became noisy at their play, whereupon appellant twice left his work, proceeded to the garage, climbed the ladder and requested them to leave. The testimony of AC is that upon appellant's third call he stayed but a minute and that he 'licked' her 'potty' once as she stood near the aperture through which he projected his head in order to communicate with them. YZ testified in substance that appellant 'kissed' AC's 'pee-

wee.' AC's younger sister, aged five, was definitely present on the first two calls made by appellant to the solarium but she was not called to the witness stand. There is no testimony that at any time did appellant enter into the sunroom where the children were at play. At each call he merely stood on the ladder so that his eyes were on a level with a solarium floor. The only proof of a copulation is contained in the foregoing, except that when asked as to the location of her 'potty,' AC pointed, whereupon the district attorney stated: 'She is indicating the crotch.'

"Appellant predicates his appeal upon the claim that the evidence is inadequate to uphold the conviction. He inveighs lengthily against the alleged inconsistencies and discrepancies in the testimonies of the two little girls. But these vices are such as naturally would occur in the narratives of little children concerning a sudden occurrence. However, in view of our construction of the statute the judgment should not prevail.

"(1) The section of the Penal Code under which the information was drawn makes it a felony for a person to participate in the 'act of copulating the mouth of one person with the sexual organ of another.' That section comes under Chapter V of Title IX, s 281, et seq., of the Code, which chapter deals with bigamy, incest and the crime against nature. 'The crime against nature,' as contemplated by the legislature, is the perverted act of uniting the mouth of one participant with the sexual organ of the other with a view of gratifying the sexual

desire. A mere contact of the mouth with the sexual organ of another, either by a 'kissing' or a 'licking,' cannot be construed to mean a copulation. The word copulation has never had the meaning of mere contact. It has always had the significance of the verb 'to couple,' which is an English derivative. It is derived from the Latin copulare, which is translated 'to couple, join, unite, band or tie [62] together.' White's Latin Dictionary, the Latin noun coupla is translated by the lexicographers as 'that which joins together, as a band, tie or leash.' For over three hundred years the English derivative has had no other significance than that of uniting in sevual intercourse.' In Stark's Elementary and for an indefinite past has been the union of the sexes in the generative act. Standard Dictionary. Webster's International Dictionary. The Oxford Dictionary (1893) defines the word thus: 'To unite in sexual intercourse.' In Stark's Elementary Natural History (1828) it is given the same usage. Goldsmith's Natural History (1874) refers to the 'copulating season.' In Quick Dec. Wife's Sister (1703) appears: 'An hainous sin * * * in the brother to have copulated with this widow.' In the King James translation (1611) of Leviticus, 15:16-18, we find that the Mosaic Laws ordained that 'the woman with whom man shall lie with seed of copulation, they shall both bathe,' etc.

"Thus does it appear that since Shakespeare reinforced the static character of the English idiom the word copulate has had primarily an unvarying significance, to wit, the act of gratifying sexual

desire by the union of the sexual organs of two biological entities. This is the meaning of the word wherever found in statutes and decisions." And, may it please the Court, this decision quotes 14 Corpus Juris, 18 Corpus Juris Secundum, Copulation 130; 13 Corpus Juris 933. [63]

"Therefore, the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are united or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desire. A mere kiss or lick of the private organ, even though lewdly done, is not copulation.

"(2) Indeed, the physical facts disclosed by the record here render practically impossible the occurrence of the act charged."

I submit to the Court that the same thing is true here. "That defendant, without laying his hand upon the child, standing on a ladder leading to a loft where the three girls were at play; standing only sufficiently high for his head to be level with the floor; his employer close at hand expecting his immediate return and a friend nearby awaiting his descent—that under such circumstances he could have developed a purpose to commit an act of sexual perversion does not accord with the universal concept of the psychology of humans who indulge in such practices. A person so addicted, if not surrounded by familiar pals, would have been prompted by his cunning and his fear of apprehen-

sion to seek retreat from the gaze of those whom he knew to be his superiors in the arts of virtue.

"Moreover, conceding the contact of appellant's mouth with some part of the body of the little girl, the [64] evidence herein is not sufficient to establish that he touched her sexual organ. AC's testimony is that he 'licked' her 'potty.' No evidence identified 'potty' as a sexual organ. The nearest approach to such identification was the language of counsel which we above adverted. Such evidence does not measure up to that approach to reasonable moral certainty which the law requires in order to sentence a man for fifteen years in a state's prison. Neither is the testimony of YZ to the effect that appellant 'kissed' the 'pee-wee' of AC proof of an oral copulation of appellant with the sexual organ of AC. YZ's testimony is that AC was sitting on the floor near the aperture into the solarium, and that appellant's head came only to the level of the floor at the time he performed the alleged act. Wherever she sat, obviously it would have been necessary for YZ to have seen through the thigh and clothing of AC or through the head of appellant in order to know what his lips contacted the crotch or the sexual organ of her companion.

"This experience," and I ask the Court to be particularly careful with the following language and to give it great significance. "This experience may become a bitter memory in the lives of these children, but its loathsome phases will not overcome the presumption of innocence that follows the accused or relieve the state of its burden to prove

the crime alleged. That appellant might have been guilty of some reprehensible behavior not named in the [65] accusation, which we do not affirm, is no justification for this conviction. Trials of adults upon charges of sex perversion and kindred crimes growing out of the relations of the accused to little children require the utmost vigilance upon the part of courts at every stage of the consideration of such causes. No charge is more easily made and none is with more difficulty disproved. As recently observed by the Supreme Court: 'As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of "guilty"; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt.' People v. Adams, 14 Cal. 2d 154, 167, 93 P. 2d 146, 152."

And the Court further said, "for the reasons suggested we are convinced that the judgment is an

injustice which should be corrected now," and the judgment of the trial court was reversed. [66]

Now, may it please the Court, the only testimony that we have in the record to whether or not there was in fact a copulation is the testimony of this girl that he put his thing in her mouth. There was no testimony whatever of an emission. There is no testimony as to how long she had it in her mouth. In view of this case, it seems to us that the Court should direct a verdict of not guilty. By the same token, your Honor, it is our contention, of course, that the girl is an accomplice. I can hear the prosecution say now she cannot conceivably be an accomplice because she stated that she was afraid. There was testimony about a gun. The little girl did not testify that she ever saw a gun or that she was threatened with a gun, or that she was threatened in any way, any fashion whatever.

There must, your Honor, have been some threat to cause her to become fearful and there is no testimony as to why she was afraid. I think the best that she could do in her testimony was that, I was afraid because I wasn't used to men coming in the house and doing things like that. The only reason why the child could not be, or is not an accomplice is because of an alleged fear, yet there is no statement in the record as to why she was fearful. It is possible that fear may exist without threats, but it is not very easy to suppose there can be fear if there is no compulsion and there was no statement by this witness of any compulsion. [67]

State against Hoffman, 280 Northwestern 357,

"Fear must be induced by threats." State against Anderson, 267 Northwest 121, Page 124, "Fear may be induced by threats either to do an unlawful injury of the person or property of the individual threatened or to any relative of his or member of his family." In re McKay 37 Pacific 1106, "The fear which the law recognizes as an excuse for the perpetration of an offense must proceed from immediate and actual danger threatening the very life of the party. The apprehension of loss of property by waste or fire and even an apprehension of a slight or remote injury furnishes no excuse." United States against Beagle, 2 U. S. Reports at Page 346, "In the total and complete absence of any showing as to why this child was fearful, in the absence of any testimony as to any threats, coercion, use of force, there can be no assumption by this Court that she was placed in fear. If there actually then was no fear by this little girl, then certainly she became an accomplice to the crime. She is over the age of seven years. Our statute provides that our law shall be that of the common law except where altered by statute. If the child is over the age of seven years, then she may be accused or charged with the crime. If she may be charged with the crime she therefore is an accessory. I think those things are elementary, your Honor. If the child is an accomplice there then is a complete and utter failure of any corroborating testimony and our statute likewise [68] provides that an accused shall not be convicted on the uncorroborated testimony of an accomplice. The word corroborated means to

strengthen and the facts must be sufficient and of such probative value as to connect the defendant with the commission of the crime as charged. Hubbard against State, 45 Southeastern, page 798. Corroboration must tend to connect defendant with the perpetration of the crime as charged. Harper against State, 27 Southeastern Second, 233. Corroboration must be evidence from an independent source having some material fact tending to show that the defendant committed the crime. People against Ies, 3 New York Supplement, Page 32 and Page 34. Corroboration must be of a substantial character. Underwood against State, 171 Southwestern Second, 304, at Page 307.

I have a further case or two, your Honor, which I am unable at this time to find, to this extent that the opportunity to have committed a crime or a showing by way of an attempt to corroborate that the person accused had an opportunity to commit a crime is not sufficient corroboration and that is all that there is in this instance, a showing that there may have been an opportunity.

For all the various reasons which I have set forth, we move the Court for a verdict of acquittal.

Mr. Yeager: May it please the Court, Mr. McNabb. The government has charged in the indictment that Harold Hutson feloniously had unnatural carnal copulation by means of [69] the mouth with another person, to wit, Virginia Mead, not by means of his mouth, your Honor, by means of the mouth. The statute wherein this indictment was drawn, that if any person shall commit sodomy or a crime

against nature or shall have unatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind, such person on conviction thereof, shall be, and so forth.

Your Honor, we believe that the defendant was not mislead by this indictment, that he knew the nature of the offense, and he could properly prepare a defense. In 48 American Jurisprudence at Page 551 they state therein, "Where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required. Specifically, however, in charging the crime of sodomy, because of its vile and degrading nature there has been some laxity of the strict rules of pleading."

We cite, your Honor, People v. Battilana, 126 Pacific Second, 923. At page 927 the Court stated, "The fourth count of the indictment reads in part: 'The said defendant * * * on or about the 1st day of August, 1941, did wilfully, unlawfully and feloniously commit the infamous crime against nature by then and there having carnal knowledge of the body of one * * * then and there a female person, in violation of section 286 of the Penal Code of the State of California, a felony.' "

The Court went on further and said, "On account of [70] the degrading nature of the crime of sodomy it is uniformly held that it is not necessary to describe the offense with the same particularity which is required in other crimes. In 8 Ruling Case Law, page 335, section 366, it is said in that regard: '* * * by reason of the vile and degrading nature

of this crime, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required.' ''

Also, in the case of Tonker v. United States, 178 Federal Reporter, 712, the District of Columbia has as its statute describing and penalizing certain sexual acts and then provides: "And in any indictment for the commission of any of the acts, hereby declared to be offenses, it shall not be necessary to set forth the particular unnatural or perverted sexual practice with the commission of which the defendant may be charged," and the effect of that is that such crimes you do not have to explain with such particularity. Further down on the page, "The indictment followed the statute precisely. It identified the statute alleged to have been violated. The charge, as stated, was that on a certain day and within the District of Columbia appellant 'committed a [71] certain unnatural and perverted sexual practice' with a certain person. Appellant moved to dismiss but did not move for a bill of particulars.

"Appellant says that the indictment was insufficient to satisfy the constitutional requirement that

he be informed of the accusation against him. We think it was sufficient. An indictment must describe the offense with such certainty as that the accused may prepare his defense and also may be protected against another charge for the same offense, but modern practice has been away from prolixity and from details which are unnecessary to the proper function of the indictment. The cases cited in the footnote hereto support the view we take, and we are persuaded particularly by the opinion of Judge Lehman in People v. Bogdanoff, in which opinion Chief Judge Cardozo and Judges Pound and O'Brien concurred.

"The indictment before us plainly apprised the accused of the nature of the offense with which he was charged, and plainly identified that offense. Only details of description were missing, and they were available to him as a matter of right. The utmost of his constitutional right was not and could not be denied him."

There the Court was of the opinion that he could have obtained a bill of particulars and we believe that is analogous to the Federal Rules of Criminal Procedure wherein a bill of particulars is obtainable.

Glover v. State, 101 Northeastern Reporter, [72] 629, that case they, the Court said, "Omitting the formal parts beginning and closing it, the count of the affidavit in question reads as follows: 'Lawrence D. Stevens, being first duly sworn according to law, deposeth and saith that on or about the 19th day of August, 1912, at the county of Howard and state

of Indiana, Otho Glover did then and there unlawfully and feloniously commit the abominable and detestable crime against nature with one (here the name of the pathic is given) and who was then and there a boy eleven years of age." And there they went on, your Honor, to say that "by reason of the vile and degrading nature of this crime, it has always been an exception of the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood is all that is required."

And also in State v. Langelier, 8 Atlantic Reporter 2d, 897, the Court also went on to explain because of the violent and degrading nature of the crime that great particularity was not necessary, and "a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required."

It says in People v. Hickok, 216 Pacific 2d, 140, at [73] page 145, the Court said, "Cases such as People v. Angier, 44 Cal. App. 2d 417, 112 P. 2d 659 and People v. Coleman, 53 Cal. App. 2d 18, 127 P. 2d 309, are not here applicable. In those cases there was no penetration—here there was an insertion into the mouth beyond the lips. The degree of penetration is a false factor. Any penetration of the

mouth, no matter how slight, constitutes a violation of the section.

And in that case also, your Honor, the girl testified that it didn't go beyond my teeth because my teeth were clamped together, but it was inside of my lips in my mouth.

People v. Ash, 161 Pacific 2d, 415. Page 416, "It is now established that it is not necessary in order to constitute a violation of section 288 of the Penal Code that the defendant touch the naked body of the prosecuting witness, it being sufficient that a lewd or lascivious act is committed upon or with the body, or some part or member thereof, of a child under the age of fourteen years."

In People v. Harris, at 238 Pacific 2d, 156, was the same Court, your Honor, that denied the Angier case, the Court said, "This court was impressed that the mouth of the accused could not have touched the bodies of the children. Such evidence was an indispensable element in the successful prosecution of such crime. On reaching that conclusion we were led into a discussion of the significance of the word 'copulate.' While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the [74] use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court."

Your Honor, I also at this time would like to go back into the point of an accomplice, that this

young girl eleven years of age is an accomplice to this defendant, Mr. Hutson. It is the government's contention, your Honor, that she is not an accomplice which is shown by her testimony and by her actions in this particular case. We, as Mr. McNabb so pointed out, that she testified that she was afraid, also her testimony, she testified he made me put his thing in my mouth. We believe, your Honor, that that certainly shows that there was some force involved. The government does not believe that we have to show, go to great length to go to the amount of force that would be necessary on an eleven-year-old child. In fact there was a mention of a gun and the defendant himself, as testified to by Mr. Perry, that he stated he had a gun under the pillow. And also by the actions of this young girl, your Honor, as testified to by Mrs. Perry and Mr. Perry in that she ran screaming next door and banging on the door to get in and she was crying. To us, your Honor, that certainly don't show that this young girl was an accomplice to the act that the defendant is charged with.

We also believe, your Honor, that the force is not an [75] element of the offense, but take the fact, even if she is an accomplice, your Honor, even assuming by great length that this girl was an accomplice, we still believe that there was corroboration testimony given by Mr. Perry and Mrs. Perry. She went to the house while she was in great shock, crying; she made certain utterances and that Mr. Perry was downstairs immediately, grabbed a crowbar and went over to the home of this defendant

and he found the defendant there in bed. Although his testimony was that he did not see any clothing lying around. We believe, your Honor, and submit to this Court that the indictment is sufficient in that it apprised the defendant of the nature of the crime against him, and we also submit to the Court, your Honor, that the young girl, Virginia Mead, was not an accomplice to this act, but even and by all great imagination and assumption that she was an accomplice we believe that there is supporting testimony and corroborating testimony that this act was committed.

I thank you.

Mr. McNabb: May it please the Court.

The Court: Mr. McNabb.

Mr. McNabb: I have no quarrel with the statement of the government concerning the sufficiency of an indictment in a crime of the horrible nature of sodomy, but the same token, I think that we are in complete accord on what the indictment should say. And Mr. Yeager quoted to the Court several instances in which the Court said the indictment is [76] sufficient if it is "easily understood." Great particularity, and I bracket those words, is not required as is stated in the cases cited to the Court. Great particularity is not. Easily understood is required.

Now, your Honor, it would not have been difficult, in fact it would have been a simple proposition, an exceedingly simple matter, had this indictment been drawn to include either the words his or her

between the words by means of his or her mouth so that it could have been "easily understood."

As I have pointed out to the Court, the only case that I could find on the proposition of a judicial construction by means of said "with," with, and the government has not seen fit to show that I was in error in that regard. With the mouth, by the same token they have not shown that the definition of copulation as set out in the Angier case as I have given it to the Court has been changed, that that is not a true and correct statement of the law as it exists today.

Certainly, your Honor, this jury from the lawful evidence that has been introduced here could at best at this time guess there has not been sufficient proof to associate this defendant with the crime with which he has been charged. The only guess as to his guilt. The government, therefore, your Honor, has failed to establish beyond a reasonable doubt the guilt of this party and we therefore are entitled to a directed verdict. There is no question but that the little girl is an accomplice because there is no showing of fear. [77] She says she was afraid but from the cases that I cited to you, Judge, and they have not come forward to show that those cases are wrong, either, there must be some showing of the force or of the threat or of the coercion, that thing which caused her to be afraid. She cannot state I am afraid, and therefore go excused of any act. Any person who would come before this bar of justice as an accomplice to a crime could say, "I was afraid," and if they didn't substantiate that fear

by some testimony concerning why they were afraid, then the fear that they stated that they had at the time is insufficient. The cases are uniform on that point. There is just no question about it. Here there has been no statement, no evidence, no testimony of this little girl as to why she was afraid. If she was not afraid then there is no question but that she was an accomplice and if she was an accomplice there is an utter want of proof of any corroboration tending to show that this defendant was guilty of the crime with which he is charged.

I found the other cases in prosecution for statutory rape, opportunity may be considered as one of the circumstances, but it is not "corroborating." Now, your Honor, this case is very closely allied with statutory rape. The nature of this crime is for all practical purposes the same as statutory rape. That is Alcorp against State 106 Pacific 2d, 838, opportunity. Now, if there is any corroboration of this little girl's testimony it is in that regard. [78] Opportunity to commit rape is not sufficient corroboration. State against Howard, 297, State against Lahmon, 1 Northwestern 2d, 629. Your Honor, couple these various questions, things that are brought out, whether or not we have any, whether we were placed on notice so that we might defend this thing; whether that indictment is easily understood in the light of present knowledge concerning irregular sex practices; whether the words, by means of, is sufficient to place this man on notice; what is the usual connotation of by means of, by means of his mouth? If they had made it easily understood

they could have increased it say by means of his or her. There is no copulation, no coition. She is an accomplice. There is no showing of fear. There is no corroboration.

For those reasons, your Honor, we feel that the Court should direct a verdict of acquittal.

The Court: The Court at this time will deny the defendant's motion. It is now 11:00 o'clock. We started this hearing at ten minutes after 10:00. The Court asked the jury to report at 10:30. I merely wish to call that to the attention of the record, and we will now take a ten-minutes recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was [79] resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, and will the Clerk, please, call the roll of the jury?

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well.

Mr. McNabb: Mr. Hutson, you take the stand, please.

HAROLD HUTSON

the defendant, called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please, sir?

A. Harold L. Hutson.

Q. Mr. Hutson, where did you reside in the month of March, 1954?

A. 516 Sixth, Hamilton Acres.

Q. Do you have any recollection of the night of the 28th day of March, 1954? A. Yes, sir.

Q. Where were you on that night?

A. I, in reference to this particular charge, I was at this particular house. [80]

Q. What particular house?

A. This Mrs. Mead's.

Q. Do you know her full name?

A. Virginia Mead, I believe. The mother is Mrs. Ona Mead, I think.

Q. Mrs. Ona Mead, she does have a daughter, does she? A. Virginia Mead.

Q. Virginia Mead, the little girl who was on the stand yesterday? A. Yes, sir.

Q. How did you happen to be at that residence, Mr. Hutson? A. I was invited in.

Q. By whom were you invited?

A. Mr. Joe Baird.

Q. Do you know where Mr. Baird resided?

A. He lived there with Mrs. Mead.

(Testimony of Harold Hutson.)

Q. He resided in the same residence with Mrs. Mead? A. Yes, sir.

Q. What time of the day were you invited to that residence? A. I don't recall the time.

Q. Well, what is the, in the evening, early evening, at night or?

A. It was in the evening late.

Q. Rather late in the evening? [81]

A. Yes, sir.

Q. And did you then enter the house?

A. Yes, sir.

Q. Who was present then when you entered the home?

A. Mr. Baird, a small child and two girls.

Q. Do you know who the two girls were?

A. This Virginia Mead and her neighbor, the little girl that was their neighbor, lived up the street.

Q. Do you recall what her name was?

A. No, sir, I don't.

Q. And a small child you mentioned?

A. Yes, sir.

Q. Do you know who the child was?

A. It is supposed to be the sister to Virginia Mead.

Mr. McNabb: Will you read that answer, please, mam?

(Thereupon, the reporter read the answer.)

The Clerk: Keep your voice up. We can't hear you.

(Testimony of Harold Hutson.)

Q. (By Mr. McNabb): Do you have any knowledge of how old the child was?

A. I would estimate between four and five.

Q. Now, all of these children up and about, running and playing and the like at that time, or do you—— A. Yes, sir.

Q. And it was what time did you say?

A. I don't recall the exact time. It was late in the evening. [82]

Q. How long did you stay at that residence?

A. I don't have any way of knowing. There wasn't any clock out there.

Q. Did Mr. Baird remain there all the time that you were present?

A. No, sir; he used my truck; said he would be back in ten minutes.

Q. Did you at that time own a truck?

A. No, sir; this truck I had borrowed from my friend that I was living with. It was a borrowed truck.

Q. But had you borrowed it for what length of time?

A. No particular length of time. It is just that I would use it when he didn't want to use it.

Q. And you in turn loaned it to Mr. Baird?

A. Yes, sir.

Q. You then were alone in the house, were you, with all three of these little girls?

A. No, sir. The children came in from playing just about the time he left.

Q. How many children came in?

(Testimony of Harold Hutson.)

A. This Virginia Mead and her little sister.

Q. What transpired then?

A. She went to bed, Virginia Mead went to bed, said it was bedtime and asked me to go home.

Q. How many rooms in that residence, if you recall?

A. I think it is a bedroom, a kitchen, a living room and bath. [83]

Q. Where did Virginia go to go to bed?

A. She went to her bedroom.

Q. What about the little child that you mentioned?

A. I put the little child to bed myself.

Q. Did you undress her? A. No, sir.

Q. Put her in bed with her clothes on?

A. I put her on the bed with her sister.

Q. Was her sister in bed at that time?

A. Yes, sir.

Q. Was she covered or uncovered, or do you recall? A. Covered.

Q. What then did you do?

A. Went to the living room and proceeded to wait for my truck.

Q. How long had Mr. Baird been gone at that time, if you recall?

A. I would say about twenty minutes.

Q. Did you testify that he was expected back shortly or what was your testimony?

A. He said that he would be back in ten minutes.

Q. Did you know at the time that you loaned

(Testimony of Harold Hutson.)

him the truck the extent of the trip that he proposed to take?

A. He supposed, he said it wasn't over a half a mile. He said he would be back in ten minutes.

Q. What then occurred, Mr. Hutson? [84]

A. I sat there, looked through books and in the process of waiting and that ten minutes drew into an hour or so.

Q. During that length of time did you have any conversation with the little girl?

A. Yes; I asked where possibly could he have gone, that I had to have that truck.

Q. Did she know where he could have been?

A. She said that she didn't have any idea where he could have gone to be so long.

Q. Now, did you have any further conversation with her?

A. When I was in the kitchen getting a drink of water somebody came up on the storm porch and I called that to her attention, I said maybe that is Joe now, and she said maybe so, and then whoever it was left. They didn't come into the house and it wasn't Joe. I wasn't satisfied at all because I still hadn't seen no truck.

Q. And how long, do you have any recollection of how long that you were in the house?

A. I would say the time that he and I talked and sat around there until the time that this child ran out of the house about three hours.

Q. Well, now, do you know why the child ran out of the house?

(Testimony of Harold Hutson.)

A. Well, she asked me to go home at different times.

Q. How many times?

A. Three times, three times, and she got up mad because [85] I wouldn't leave. I couldn't. In the first place there wasn't anybody there with the children and in the second place I didn't have my truck. It was borrowed. She was plumb ornery about it, got up, ran by me out the door. I took out after her, tried to catch her. I didn't know whether she had a fit or what, or was just in the heated anger.

Q. Now, do you recall how she was attired at the time that she ran out of the house?

A. She was dressed with the exception of her shoes and coat.

Q. Do you know where she went?

A. She went to Mr. Perry's.

Q. Did you follow her over there?

A. Yes, sir.

Q. Did you have any conversation with her?

A. I asked her what was the matter with her, and she says get away, get away.

Q. You heard this little girl testify concerning some rather reprehensible act which she alleged that you caused her to perform. Did you during the course of that evening touch that little girl?

A. No, sir; I didn't.

Q. Did she touch you?

A. No, sir; had no cause to.

Mr. McNabb: No further questions. [86]

(Testimony of Harold Hutson.)

Mr. Yeager: No questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. McNabb: May it please the Court, now without cross-examination the defendant finds itself in the same position that the prosecution was in yesterday and we ask the Court for a recess. Perhaps it would be wise to take it until 2:00 o'clock, if the Court has no objection.

The Court: You mean, Mr. McNabb, you have other witnesses who aren't available at this time?

Mr. McNabb: That is correct, your Honor.

The Court: It is now 11:25, and, members of the jury, once more it is my duty to admonish you that it is your duty not to discuss this case with anyone; not to permit anyone to discuss it with you; not to listen to any conversation concerning the subject of the trial; and do not form or express any opinion until the case is finally submitted to you. The jury is excused then until 2:00 o'clock.

The Clerk: Court is recessed until 1:30.

(Thereupon, at 11:25 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant. [87]

The Clerk: Mr. McNabb just stepped around to my office a second, your Honor. He said he would be right back.

The Court: It is just 2:00 o'clock.

Mr. Yeager: Your Honor, may I file with the Clerk three requested instructions submitted on behalf of the government? Mr. McNabb has been served with a copy, your Honor.

The Court: Very well. Let the record show the presence of the defendant and his counsel. Parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. Yeager: The government so stipulates, your Honor.

Mr. McNabb: The defense will so stipulate.

The Court: Very well, and in your absence, Mr. McNabb, the government just filed some requested instructions with the Court.

Mr. McNabb: Yes, your Honor, I have seen them.

The Court: When will you have your instructions for the Court? I would like to have them as soon as possible, and by 4:00 o'clock.

Mr. McNabb: By 4:00 o'clock? Did I understand the Court correctly, sir, you say by 4:00 o'clock?

The Court: Yes.

Mr. McNabb: We will have them by that [88] time.

The Court: You may proceed.

Mr. McNabb: The defense rests, your Honor.

Mr. Yeager: The government rests, your Honor.

The Court: Very well.

Mr. McNabb: If the Court please, I would like to be heard again out of the presence of the jury.

The Court: Yes, and in view of the resting the Court will want requested instructions before 4:00 o'clock. I assumed we were going on, and, members of the jury, once more I admonish you that it is your duty not to discuss the facts of this case with anyone; do not permit anyone to discuss them with you, and do not listen to any conversation concerning the subject of this trial and do not form or express any opinion until the case is finally submitted to you, and you are excused and we will call you back, I think in ten or fifteen minutes.

(Thereupon, the jury withdrew and the following proceedings were had out of the presence and hearing of the jury.)

The Court: Mr. McNabb, do you have any requested instructions prepared at this time?

Mr. McNabb: I do not, Judge, but we are in the process, sir, of, we will have only one. It should take only a short length of time to get it prepared.

The Court: Very well.

Mr. McNabb: At this time, your Honor, I should again [89] like to renew our motion for a directed verdict and on the same lines and in the same authority as we directed to the Court's attention earlier in the day.

In addition, however, I think the Court should take into consideration the fact that the government did not choose to call any witnesses to contradict

any of the testimony of the defendant in this action, and that his testimony therefore must be taken as true. The government by the same token did not see fit to cross-examine him and I think therefore his testimony is entitled to a bit greater weight than otherwise would be true.

I think, if it please the Court, that our statement of the law as we addressed it to the Court this morning is certainly sufficient basis upon which this Court can direct a verdict, that the government as yet has failed in any of the particulars to introduce a sufficient amount of testimony that this jury can use to reasonably find that this defendant is guilty beyond a reasonable doubt, that duty which is, of course, upon the government. They have not, as we see it, sustained their duty to introduce a sufficient amount of proof to get over that burden.

Now, Judge, I think that the principal thing in reference to this indictment, the principal question is, which was stated quite adequately and distinctly by Mr. Yeager this morning, whether the indictment and the language in which it is drawn is easily understood, and I submit to the Court in [90] the light of common knowledge that it is not easily understood. It is impossible for the average jurist, who has far more knowledge, technical knowledge particularly, than that of a common layman, the defendant in this case, to ascertain that thing with which he has been charged, that is, is he charged with placing his mouth upon the person of the child or is he charged with forcing her to place her mouth upon him? That situation could have been easily

overcome by including in that indictment the word, his or her. By the same token, copulation coition, I have given the Court ample and adequate authority as to the meaning of those two terms. The case which we cited to the Court this morning is quite clear in that regard. The only testimony was that he required, or forced her or made her put his thing in her mouth. I think it is quite obvious that that is not sufficient or at least it seems so to me in the light of the case which I cited to the Court this morning.

By the same token, I want the Court to consider very carefully whether or not this little girl is an accomplice and in that regard, the Court need address itself only to the problem of whether or not there was a sufficient amount of fear established in this little girl's mind. On that score, the Court is in no position to guess. The decisions are quite clear on that matter, that there must be some threat, some intimidation, some coercion. There is no statement in the record other than her own conclusion, her own statement that [91] she was afraid. If there is not a sufficient basis in the record to establish fear in the mind of that child, then certainly, your Honor, she forthwith immediately becomes an accomplice to this act because she is of sufficient age to be charged as an accomplice, or as a principal in this act, and if in fact she is a principal or if in fact she is an accomplice, then it goes without question and the cases that I cited to the Court this morning, there is no corroboration here sufficient to justify a conviction.

On the basis of those reasons, your Honor, I move the Court again for a directed verdict of acquittal.

The Court: The Court believes that the government has made out a case to be submitted to the jury, and, therefore, denies defendant's motion.

Mr. McNabb: Your Honor, may we have about fifteen minutes to get up this requested instructions of ours, sir.

The Court: Certainly, and how much time do you want to argue, Mr. McNabb?

Mr. McNabb: Oh, perhaps forty-five minutes, absolute maximum.

The Court: The government?

Mr. Yeager: That is plenty long, your Honor. I believe we could do it in a much shorter period of time.

The Court: Very well. We will recess until 2:30; would that be enough time?

Mr. McNabb: Yes, that is sufficient length of time. [92]

The Clerk: Court is at recess until 2:30.

(Thereupon, at 2:15 p.m., the court took a recess until 2:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: The government has been served with six requested instructions by the defendant?

Mr. Yeager: Yes, your Honor.

The Court: The government have any objections to any or all of the instructions?

Mr. Yeager: Your Honor, we, as to Defendant's Requested Instruction No. 2, we don't believe that that is a correct definition of copulation defined to be the law; and we object to Defendant's Requested Instruction No. 3 as not being correct law; and Defendant's Requested Instruction No. 4, not to be material in this case.

The Court: The defense has been served with copies of three requested instructions by the government?

Mr. McNabb: Your Honor, these instructions of the government are not numbered so I did not know how to—— [93]

The Court: I noticed the same difficulty. I might then state that the Court intends to include Government's Requested Instruction——

Mr. McNabb: Based upon a particular case perhaps, Judge?

The Court: Very well, People v. Calkens.

Mr. McNabb: We have no objection to it.

The Court: The Court refuses Plaintiff's Requested Instruction People v. Russell for the reason that there has been no evidence of consent in this case and the Court intends to give Plaintiff's Requested Instruction, People v. Hickok.

Mr. McNabb: To which the defense objects on the grounds that it is at variance with the indict-

ment, the further ground that it is vague and indefinite and is not a correct statement of the existing law.

The Court: The Court refuses Defendant's Requested Instruction No. 1 for the reason that the instruction is included sufficiently in the Court's instructions; and the Court refuses Defendant's Requested Instructions Nos. 2 to 6, inclusive, for the reason that they are either included or in the Court's opinion do not state the law applicable to the case at bar.

And gentlemen, my main purpose in calling you here at this time was so that I could make that record and inform you before I gave you each a copy of the instructions. Now, [94] you will want an opportunity to read them before you argue or maybe the government won't. You may if you want to take ten minutes. We will take ten minutes more on it.

Mr. McNabb: I would rather like to run through these if I may.

The Court: We will take ten minutes more. I haven't assembled the jury yet anyway.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

The Court: We will take a ten-minute recess.

The Clerk: Court is at recess for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of the cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, and the parties wish to stipulate that the twelve persons in the box are the jurors duly impanelled and sworn to try this case.

Mr. McNabb: The defense will so stipulate, your Honor.

Mr. Yeager: The government so stipulates.

The Court: Very well.

Mr. McNabb: I would like to approach the bench if I may, your Honor. [95]

The Court: Very well.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

Mr. McNabb: May it please the Court, I would like to object to the instruction on Page 7 as follows: "If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find the particular defendant not guilty." Now, that is a statement, that is a negative statement, your Honor. If there is any, it is incumbent upon the prosecution to prove to this jury beyond a reasonable doubt that the defendant is in fact guilty and by this negative statement is definitely, I feel, prejudicial and not a correct statement of the law. This requires a finding on the part of the jury that they from the evidence that the defendant is not guilty. Now, it requires a positive finding on

the part of the jury that the defendant is in fact guilty and I therefore object most strenuously to that particular instruction.

The Court: The Court, of course, feels that that is very favorable to the defendant, but will certainly consider deleting it if the defendant takes exception to that particular clause.

Mr. McNabb: Well, this requires a positive finding which is not required. It takes a positive finding on the part of the jury that the defendant is in fact guilty of a [96] crime and they do not have to search about for some fashion in which to find him innocent.

The Court: As the Court says, I am not trying to force counsel to agree with me, but that seemed very favorable to me to the defendant, that particular instruction. Does the government have any objection to deleting that?

Mr. Yeager: No, your Honor.

The Court: The Court shall delete it upon the special urgency of the request, of the exception taken by the defendant.

Mr. McNabb: And likewise as to the entirety of Instruction 19 which I feel is not material to this case.

The Court: I am glad to discuss that with counsel. What is the government's attitude on 19?

Mr. McNabb: There is no charge apparently that the child violated any law. If there is such it wasn't in issue at this case or this trial.

The Court: That again the Court felt was favor-

able to the defendant, but if the defendant wishes it deleted and the government has no objection we will delete it also.

Mr. Yeager: We have no objection.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

(Thereupon, Mr. Yeager presented a closing argument to the jury in behalf of the plaintiff.) [97]

(Thereupon, Mr. McNabb presented a closing argument to the jury in behalf of the defendant.)

(Thereupon, Mr. Stevens presented a rebuttal argument to the jury in behalf of the plaintiff.)

The Court: Members of the jury, once more I admonish you not to discuss this case with anyone, not to permit anyone to discuss it with you, and not to listen to any subject concerning, or any conversation concerning the subject of the trial, and do not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess after which I will instruct you.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 4:00 p.m., the court took a recess until 4:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Let the record show the presence of the defendant and his counsel. Do the parties wish to stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. McNabb: The defense will so stipulate, your Honor.

Mr. Yeager: The government so stipulates, your Honor.

(At this time, the Court read the instructions to the jury as follows): [98]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the indictment filed in this court and the defendant's plea of "not guilty." This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an indictment has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to

infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the United States and the defendant have a right to demand and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, [99] regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

(2) You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for both parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, either party has ad-

mitted a fact to be true, such admission may be considered by you as evidence in the case.

(3) At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence [100] that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

(4) The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you

will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

(5) The prosecution and the defendant both are entitled to the indicidual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that [101] respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

(6) In arriving at a verdict in this case the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant.

(7) If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be in-

ferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

(8) The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability [102] of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

(9) The jury are the sole and exclusive judges of the effect and value of evidence addressed to them them and of the credibility of the witnesses. The character of witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if

any, against one or any of the parties; by the character of his testimony; or by evidence affecting his general reputation for truth, or that his moral character is such as to render him unworthy of belief; a witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial; and by proof that he has been convicted of a crime. [103]

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his or her testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict.

(10) If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

(11) You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce [104] conviction in your mind, as against the declarations of a lesser number of a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

(12) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testi-

mony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree [105] of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.

(13) The law does not require any defendant to prove his innocence, which in many cases, might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of a de-

fendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible [106] doubt, because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(14) Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon either or both of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

(15) Count I of the indictment charges that the defendant feloniously had unnatural carnal copulation, by means of the mouth, with Virginia Mead.

(16) Any person who has unnatural carnal copulation by means of the mouth, with mankind of either sex, shall be guilty of a crime.

(17) The offense charged in Count I consists of and in its commission requires the uniting or the joining of the mouth of one person with the sexual organ of another but if you find any penetration however slight it is sufficient. [107]

(18) Count II of the indictment charges that the defendant, as a part of the same transaction set forth in Count I of the indictment, feloniously persuaded Virginia Mead, a child under the age of 18 years, to participate in an act of unnatural carnal copulation by means of the mouth, which act manifestly tended to cause Virginia Mead to become a delinquent child.

(19) Any person who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which would cause such child to beome a delinquent child is guilty of the crime of contributing to the delinquency of a child.

(20) You are instructed that the plaintiff need not show that the minor, Virginia Mead, is in fact a delinquent child, for it is sufficient if the prosecution proves the commission of the acts alleged in the Indictment, which would tend to cause said minor to become delinquent.

(21) Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who

will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision. When you agree upon a verdict as to a count of the indictment you are to insert the words "guilty" or "not guilty," as the case may be, into the verdict form which has been prepared by the Court, and then have it signed and dated by your foreman. [108] When you have reached a verdict as to each count of the indictment you are to return with your verdicts to this room.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At the conclusion of the court reading the instructions to the jury, the following proceedings were had):

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

Mr. Yeager: Your Honor, I noticed a typographical error, Virginia Mead instead of Virginia Mean.

The Court: The Court will correct that, and do you want me to announce the correction to the jury or merely correct it?

Mr. McNabb: It is not important.

The Court: What page is that?

Mr. Yeager: Page 8, your Honor.

The Court: Do you have any exceptions other than heretofore urged?

Mr. McNabb: The Court's oral recitation of the instructions did not conform to the instructions as they were presented to us. [109]

The Court: Do you know what the variance was, Mr. McNabb?

Mr. McNabb: Judge, there were four or five of them.

The Court: It might take a little while, it is true, but I discovered some little things after I gave you the copies and I will now point them out specifically. On Page 4, I inserted the words "the character of the witnesses."

Mr. McNabb: That was the only one, Judge?

The Court: No, that was one. And on Page 5, the Court, this is in line, between line five and six, the Court inserted the words "or his biased or prejudice, if any," and just now the government having called my attention to the mis-spelling of the surname of Virginia Mead and changed the "n" to "d" in paragraph 15. Those are the only changes.

Mr. McNabb: May I see that, Judge?

The Court: Yes.

Mr. Yeager: Your Honor, the next paragraph, paragraph 17, typographical error in there, should be a "d" instead of an "n" also.

Mr. McNabb: That is not material.

The Court: Page 8. At this time the Court is

again ink-changing the word, the name "Mean" to "Mead," changing the "n" to a "d."

Mr. McNabb: Your Honor, I am objecting at this time to the instructions in that I feel that they are not sufficient [110] in that they do not entirely instruct the jury as regards every aspect of this case, particularly in view of the motion which I made this morning in regard to the possibility of the prosecuting witness being an accomplice, the possibility, or the credit to be given to spontaneous utterances, those two things in particular I conceive of at the moment at which there is no instruction whatever.

The Court: You wish to confer with Mr. Gore, possibly; you have any further exceptions?

Mr. McNabb: That is sufficient, Judge.

The Court: Does the government have anything further?

Mr. Yeager: No.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: Will the Clerk at this time qualify the bailiffs and administer the oath.

(Thereupon, the Clerk of the Court proceeded to qualify the bailiffs and administer the oath.)

The Court: Very well. The jury may retire now for deliberation.

(At 4:35 p.m., the jury in charge of its sworn bailiffs, retired to enter upon its deliberations.)

The Court: Gentlemen, I wouldn't ask it in the presence of the jury, but do you wish to stipulate that the [111] reporter need not be present when the verdict is returned?

Mr. McNabb: The defense is willing, your Honor.

Mr. Yeager: The government is willing, your Honor.

The Court: Very well.

The Clerk: Court is adjourned until nine o'clock tomorrow morning subject to the return of this jury now deliberating.

(At 10:30 p.m., April 19, the jury re-entered the courtroom and the following proceedings were had):

The Clerk: Court is reconvened.

The Court: Mr. Gore, I understand you appear as attorney of record for the defendant.

Let the record show the presence of the defendant and his attorney, Mr. Gore. Call the roll of the jury, please.

(Thereupon, the Clerk of the Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Members of the jury, have you reached a verdict?

Mr. Hardenbrook: Your Honor, we are unable to reach a verdict at this time, and we would like fur-

ther instructions from the bench and might we have a transcript of the testimony of the witnesses.

The Court: It would require a great deal of time to produce the transcript of the evidence, and that is not [112] considered advisable at this time. The Court feels constrained now in view of the fact that you apparently have not reached an agreement to give you some additional instructions at this time, which the Court shall do.

(Thereupon, the Court read an additional instruction to the jury as follows):

ADDITIONAL INSTRUCTIONS TO THE JURY

This is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict or verdicts. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly and according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiesence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the

same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be [113] submitted to a jury more intelligent, more impartial or more competent to decide it or that more or clearer evidence will be produced on one side or the other.

In conferring together, you ought to pay proper respect to each others' opinions, with a disposition to be convinced by each others' arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own conviction, and not a mere acquiescence in the conclusions of other [114] jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obliged to ask you that you again retire and the court will wait for further message from you.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At 10:45 p.m., the jury in charge of its sworn bailiffs, retired to enter upon its further deliberations.) [115]

Reporter's Certificate

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the District Court, District of Alaska, Fourth Judicial Division, Fairbanks, Alaska, do hereby certify:

That I was the official court reporter for the above-named Court on April 18 and 19, 1955, the dates upon which the cause of United States of America v. Harold Hutson, No. 1946 criminal, was heard.

That I recorded in shorthand all of the oral proceedings had in open court upon said dates.

That the foregoing pages, numbered 1 to 115, inclusive, are a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 18th day of May, 1955.

/s/ MARY F. TEMPLETON.

Subscribed and sworn to before me this 18th day of May, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court. [116]

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below comprise all proceedings listed by the defendant and appellant on his Designation of Record on Appeal in this cause, viz:

1—Indictment.
2—Motion for Continuance With Affidavits.
3—Instruction of the Court No. 17.
4—Report of the Jury made at 10:30 p.m., April 19.
5—Additional Instructions to the Jury.
6—Verdict as to Count I of Indictment.
7—Verdict of Jury as to Count II.

8—Statement of Points on Appeal.

9—Designation of Content of Record on Appeal.

10—Transcript of Record of Trial and Proceedings, Separately Bound.

Witness my hand and the seal of the above-entitled Court, this 1st day of July, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14810. United States Court of Appeals for the Ninth Circuit. Harold Hutson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed July 5, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14,810

IN THE

United States Court of Appeals

For the Ninth Circuit

HAROLD HUTSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

GEORGE M. YEAGER,
United States Attorney.
PHILIP W. MORGAN,
Assistant United States Attorney.
Fairbanks, Alaska,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,810

IN THE

United States Court of Appeals

For the Ninth Circuit

HAROLD HUTSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

On the evening of March 28, 1954 the appellant was at the Mead residence, which was located at 508 Sixth

Street, Hamilton Acres near the Town of Fairbanks, Alaska. Virginia Mead, who was eleven years of age, lived at this house with her sister and Joe Baird, who took care of the children. Her mother was working at Mount McKinley Hotel.

Virginia had broken an "E" string on her violin so she went with appellant and Joe Baird to procure one. Upon returning home, Joe Baird left to buy some liquor, so Virginia went to the Perry residence. Later she went home to bed. Virginia, her sister, and the appellant were the only persons in the house when the following events took place:

"Q. (By Mr. Yeager): And what happened after you went to bed?

A. Well, Mr. Hutson came in our room.

Q. And what happened then, Virginia?

A. And then he asked me to kiss me, and I said I didn't want to and then he kept telling me to and I kept telling him I didn't want to, and I told him to go home but then Joe Baird was, had gone out to get some more whiskey and he said that he couldn't leave until he got his car back, and so he got mad and he kept telling me to kiss him and then I told him no, and he said he had a gun and he wanted me to put my mouth on his thing.

Q. And what happened then?

A. And then I did it and then I asked him for a drink of water and thought I might go out the back door, but he wouldn't let me. I never got to, and then I ran out the front door over to Marian's house.

Q. Now, who, what do you mean by Marian's house?

A. Marian Perry.
Q. And what do you refer to as "his thing"?
A. His penis.
Q. Will you state whether or not he put that in your mouth?
A. He did." (Tr. 43,44.)

After this incident, Virginia ran next door to Perry's house, barefooted, without a coat or hat and in a hysterical condition. About one o'clock Mrs. Perry heard the screaming of the little girl and called her husband. As she went to the door, Mrs. Perry overheard a man say "what do you want to go in and bother them for, honey?" (Tr. 53.)

Mr. Perry seized a crowbar and ran over to the appellant's home. There he threatened Hutson with the crowbar but was deterred when Hutson remarked to him that he, Hutson, had a 25 caliber automatic under his pillow. (Tr. 64.) Perry then left appellant's house and called the Territorial Police. Virginia had also testified that Hutson had told her that he had a gun.

Hutson was arrested on the complaint of Frank Perry, incarcerated, and on the 14th day of April 1954 received a preliminary hearing on the charges presented against him. At the time, Mr. T. N. Gore, Jr., a law clerk in the office of R. J. McNealy, conducted the preliminary hearing and cross-examined Virginia Mead for over an hour. Gore was an attorney, and in fact a former assistant U. S. attorney, but had not been admitted to practice in the Territory of Alaska. The defendant was indicted by the grand jury on

the 7th day of January 1955 for the crimes of Unnatural Carnal Copulation and Contributing to the Delinquency of a Minor. He was arraigned on the 18th day of January, at which time the Clerk of the District Court handed him a copy of the indictment. The trial of the case was delayed because the attorney of record, R. J. McNealy, was absent from Fairbanks attending the Territorial Legislature. The case was set for trial on April 18, 1955. On the morning of April 18, 1955, Mr. George B. McNabb, Jr., presented an affidavit and motion for continuance. (Tr. 4-8.)

The reason stated for the continuance was that Mr. Hutson had retained Mr. McNabb as a defense attorney on April 16 and that Mr. McNabb had no knowledge of the case and, therefore, needed a continuance in order to properly prepare the defense. The U. S. Attorney presented strenuous argument against the continuance and pointed out to the Court that while Mr. Gore had been R. J. McNealy's law clerk in 1954, he had left McNealy's office and joined forces with Mr. McNabb. The U. S. Attorney pointed out that Gore had represented Hutson continuously; that Gore was in Court ready for trial and that the mere fact that McNabb was the attorney of record was not ground for continuance. (Tr. 21-22.)

Mr. McNabb then states; "the mere fact that there is an employee, employer relationship presently existing between Mr. Gore and myself does not necessarily mean that I am familiar with everything that is in his mind." (Tr. 23.)

The Court denied the motion for the continuance.

At the end of the government's case, the U. S. Attorney, realizing that the defense would seek to raise the denial of the motion for continuance as error in the event of an appeal, stated:

> "Mr. Stevens. Having in mind the record here, your Honor, I wish to state for the record that Mr. Gore is still in Court and he has participated with Mr. McNabb as was anticipated and he handled this matter at the preliminary hearing so we believe there has been ample opportunity to ascertain the witnesses. If the defense does not wish to state how many they will call, that is Mr. McNabb's business. But, for the record, Mr. Gore is here. He has handled this matter for over a year for this defendant, and I don't believe the time to locate witnesses is the thing that is putting the trial off." (Tr. 67.)

Following the close of all the evidence, the Court ruled upon the requested instructions presented by both parties and gave counsel opportunity to object to the proposed instructions of the Court. (Tr. 104-108.) Mr. McNabb's objections to the Court's instructions appear on page 106 and 107.

The jury retired at 4:35 P.M. April 19, 1955. At 10:30 P.M. the same day, the jury announced that they were unable to reach a verdict; that they desired "further instructions from the bench", and "a transcript of the testimony of the witnesses". (Tr. 122-123.) The Court denied the request for a transcript, stating that it would take considerable time to produce a transcript, but did give additional instructions to the jury. (Tr. 123.) The jury returned a verdict

of guilty to both counts in the indictment. On May 3, 1955, the District Judge committed the appellant to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the crime of unnatural carnal copulation and for a period of two years for the crime of contributing to the delinquency of a minor, which sentence was to run concurrently with the ten year sentence imposed.

SUMMARY OF THE ARGUMENT.

It is unfortunate to note that the appellant proceeding per se, submits the specious arguments presented by Mr. McNabb to the District Court. Mr. Gore represented the appellant throughout the proceedings from the time of the preliminary hearing to the day this Court granted the order allowing withdrawal of counsel. The motion contained the statement that T. N. Gore, Jr. was counsel in fact for appellant. Although Mr. McNabb did all the talking, the Court noticed that Mr. McNabb had conferred continuously with Mr. Gore. The Court gave McNabb an opportunity to confer with him concerning the objections to the Court's instructions. (Tr. 121.) At the time the jury announced that they could not reach a verdict, Mr. Gore appeared representing the appellant. (Tr. 122.)

The government believes that this Court is familiar with the actions of the two attorneys involved (see *Mark Myers v. U.S.,* No. 14,520, Feb. 8, 1956 (9th Cir.)).

The Court refused to release Mr. McNealy until after the motion for continuance was denied, (Tr. 26) and then only upon Mr. Hutson's decision. (Tr. 29.) This denial of the motion for continuance was a matter which rested in the sound discretion of the trial Court, and its ruling should not be disturbed unless the denial was such an action of discretion that it resulted in a substantial prejudice to the rights of the appellant.

The appellant also relies upon the alleged fact that the Court did not grant his trial counsel an opportunity to object to the instructions given by the Court. The record is clear with the exception of the additional instruction given at 10:30 P.M. April 19, 1955, that the Court did permit defense counsel to object to the instructions. (Tr. 106-108, 119-121.) As to the additional instruction, Mr. Gore was present and heard the instruction, but did not make an objection or request an opportunity to do so. Unless it is an extraordinary situation, his counsel having remained silent, the appellant cannot now raise for the first time on appeal, that the Court erred in giving the additional instruction.

ARGUMENT.

I.

THE DENIAL OF THE APPELLANT'S MOTION FOR A CONTINUANCE WAS NOT REVERSIBLE ERROR.

Appellant has failed to disclose to this Court that Mr. Gore, who was familiar with the case and had ample time to prepare it, was in fact his attorney.

Mr. Gore left the office of Mr. McNealy and became the associate of McNabb. (Tr. 21, 22.) When this change occurred, the appellant retained McNabb as his counsel of record. The appellant had known since January 18, 1955, that his case was to be tried. The trial date was delayed until Mr. McNealy returned from the legislature. He was represented by two experienced attorneys who were present during the trial.

An action of the Court upon an application for a continuance, is not a matter of right but purely a matter of discretion which is not subject to review unless it is clearly shown that such discretion was abused. *(Crono v. U.S.,* 59 F. 2d 339, 341 (9th Cir. 1932)), *(Williams v. U.S.,* 203 F. 2d 85, 86 (9th Cir. 1953)). Considering all the facts and circumstances in the record, the appellant has not clearly shown that the District Court abused its discretion. The failure to secure witnesses was not caused by the denial of the continuance since no witnesses were called by the defense on the second day of trial or any showing made that anyone was subpoenaed to testify.

II.

APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE WAS PROPERLY DENIED.

The little girl, Virginia Mead, testified that the appellant put his "thing" in her mouth and she asked him for a drink of water. Then she ran next door to the Perry's house and told Mr. and Mrs. Perry what had happened. (Tr. 43, 44.) Mrs. Perry corroborates Virginia's testimony. (Tr. 50-54.) Mrs.

Perry testified that Virginia came to her door around one o'clock barefooted and with no outer wraps; she was crying and in a hysterical state of mind. Mrs. Perry heard a man say, "What do you want to go in and bother them for, honey." Mr. Perry recognized the voice as that of the appellant. (Tr. 60.) Virginia also stated that the appellant told her he had a gun. (Tr. 43.) Mr. Perry testified that the appellant told him he had a 25 automatic under the pillow. (Tr. 64.) The appellant could not leave the children alone in the house with Joe Baird absent, but Mr. Perry found Hutson in his own residence in bed. (Tr. 60.) The inference certainly could be drawn that the appellant was in bed with his clothes upon his person since Mr. Perry did not see any clothing upon entering the room. (Tr. 63.)

There were certain conflicts in the testimony of the little girl, but that is not difficult to understand with appellant's counsel making thirty-two interruptions in fourteen pages of her testimony. The credibility of a witness is for the jury to decide.

Where a victim of a crime against nature does not consent to the act, the victim is not an accomplice and a conviction may be sustained upon the uncorroborated testimony of the unwilling witness. *(State v. Wilson,* 233 S.W. 2d 686 (Mo. 1950)), *(People v. Karpinski,* 111 P. 2d 393, 395 (Calif. 1941).) It is difficult to imagine how an eleven year old girl can be considered an accomplice in a crime against nature in any case and certainly not in the present one where Virginia refused to do the act until the appellant

mentioned the gun. (Tr. 43.) Therefore, the Court did not err in failing to give an instruction that Virginia could be an accomplice. (*People v. Featherson,* 155 P. 2d 685, 687 (Calif. 1945).)

The testimony discloses that appellant put his penis in her mouth. (Tr. 44.) "Any penetration of the mouth, no matter how slight, constitutes a violation of the section". *(People v. Hickok,* 216 P. 2d 140, 145 (Calif. 1950).)

The appellant denied the act (Tr. 97), and this left a factual issue for the jury to decide. This decision was not within the provision of the trial Court and no error was made by denying the motion of acquittal.

III.

THE COURT DID NOT ERR IN GIVING THE ADDITIONAL INSTRUCTION TO THE JURY OR DENYING A TRANSCRIPT OF THE TESTIMONY.

At 10:30 P.M. on the date that the jury retired for deliberation, they returned to the Court and requested additional instructions and a transcript of the testimony. The additional instruction was given to the jury (Tr. 123, 124), and the giving of additional instructions has always been held to be within the discretion of the trial Court. *(Allen v. U.S.,* 186 F. 2d 439, 444 (9th Cir. 1951).)

Mr. Gore made no objection to the instruction at the time, but counsel choose to claim it as error in his statement of points on appeal. Appellant cannot object for the first time on appeal to instructions

unless they are so erroneous that the giving thereof results in plain error. (Rule 30 and 52, Federal Rules of Criminal Procedure.) Surely the giving of this instruction is not such an extraordinary situation as would justify a disregard of the provisions of Rule 30 *(Herzog v. U.S.,* (9th Cir. No. 14,611, May 29, 1956)), because the instruction was very similar to the one approved by the Supreme Court of the United States. *(Allen v. U.S.,* 164 U.S. 492, 501 (1896).)

The trial Court may determine, within its discretion, whether or not the jurors may have a transcript of any or all the testimony in the case. *(C.I.T. Corporation v. U.S.,* 150 F. 2d 85, 91 (9th Cir. 1945).)

CONCLUSION.

For the reason set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,
June 18, 1956.

Respectfully submitted,

GEORGE M. YEAGER,
United States Attorney,

PHILIP W. MORGAN,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

ALASKA COMPILED LAWS ANNOTATED, 1949.

65-9-10. *Unnatural crimes.* That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than ten years.

65-9-11. *Contributing to delinquency of child: Suspension of sentence: "Delinquency" defined.* Any person who shall commit any act, or omit the performance of any duty, which act or omission causes or tends to cause, encourage or contribute to the delinquency of any child under the age of eighteen years, or who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which would cause such child to become a delinquent child, or who shall do any act which manifestly tends to cause any child to become a delinquent child, shall be guilty of a felony and upon conviction there of shall be punished by imprisonment in the penitentiary for not more than two years nor less than one year, or by imprisonment in the federal jail for not more than one year nor less than one month, or by fine of not more than one thousand dollars nor less than one hundred dollars, or by both such fine and imprisonment. Provided, however, that the Court may suspend the execution of sentence for a violation of the provisions hereof,

and impose conditions as to conduct in the premises of any person so convicted and make suspension depend upon the fulfillment by such person of such conditions and in case of the breach of such conditions, or any thereof, the Court may order the defendant arrested and placed in the custody of the marshal as though there had been no suspension.

For the purposes of this Act any child under the age of eighteen years who violates any law of the United States, or of the Territory, or any city or town ordinance; or who is incorrigible, either at home or in school, or who knowingly associates with thieves, vicious or immoral persons, or who, without just cause and without the consent of its parents, or custodians, absents itself from home or its place of abode, or who is in danger of becoming or remaining a person who leads an idle, dissolute, lewd or immoral life or who knowingly frequents a house of ill repute; or who knowingly frequents any place where any gaming device is operated; or who patronizes or visits any public pool room, or who wanders about the streets in the night time without being on any lawful business or occupation, or who habitually wanders about any railroad yards or tracks, or who habitually uses vile, obscene, vulgar, profane or indecent language, or who is guilty of or takes part in or submits to any immoral act or conduct; or who is addicted to the habitual use of intoxicating liquor or any drug, shall be deemed a delinquent child.

No. 14,811

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN DOHERTY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,811

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN DOHERTY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is conferred on this Court by Title 21 United States Code, Section 174, Title 26 United States Code, Sections 4704 and 7237, Title 18 United States Code, Section 371, and Title 28 United States Code, Section 1291.

STATEMENT OF THE CASE.

Appellant was indicted in five counts on January 26, 1955 for violations of the narcotic laws of the United States (Vol. 1, Tr. 1-6). The first count of the indictment charged both appellant and Gordon

Hollinger with concealment and facilitating the concealment of 208 grains of heroin on January 16, 1955 (Vol. 1, Tr. 2). The second count charged appellant and Hollinger with concealing and facilitating the concealment of 144 grains of heroin on January 21, 1955 (Vol. 1, Tr. 3). The fourth count charged appellant and Hollinger with selling the same 144 grains of heroin mentioned in the second count of the indictment (Vol. 1, Tr. 4). The fifth count charged conspiracy to conceal and sell heroin (Vol. 1, Tr. 4-6).

At the trial the co-defendant Gordon Hollinger was a government witness (Tr. 11). He testified that appellant, one Robert Lee Blevins and he formed a partnership for the purpose of selling narcotics sometime in December of 1954 (Tr. 106, 162). On or about January 10, 1955 the three partners discussed buying heroin from a Chinese (Tr. 26, 51). Robert Blevins called this Chinese gentleman, Bobo by name, from appellant's apartment and in appellant's presence, and arranged for a purchase of narcotics (Tr. 26, 106-111). After getting the narcotics from Bobo, appellant and the other partners added an adulterating agent to the narcotics (Tr. 31-34). Appellant tested the strength of the narcotics by using them himself (Tr. 40). Appellant and the other partners then placed the narcotics into "bindles" (Tr. 33). The narcotics were then hidden beneath the carpet on the staircase near appellant's apartment (Tr. 36). Hollinger's testimony in this respect was corroborated by the testimony of Agent Casey that narcotics were found in this place at the time of appellant's arrest (Tr. 248).

Hollinger testified that appellant, in his presence, discussed sales of narcotics and left to solicit sales of narcotics (Tr. 36, 39, 155). Appellant had received telephone calls in which narcotic sales were discussed while Hollinger was present (Tr. 189).

On January 15, 1955 appellant drove Hollinger to meet the undercover police woman to whom the January 16 (Count 1) and the January 21 (Counts 2 and 4) sales were made (Tr. 42). Appellant's assistance in the sale to the police woman in this respect was corroborated by the testimony of Agent Hipkins (Tr. 245). This act of appellant is the first overt act listed in the conspiracy count of the indictment (Count 5). Both the police woman and Hollinger testified that preliminary negotiations for a sale of narcotics were made at the Richelieu bar (Tr. 55, 197-199). They agreed to meet at the Web bar to complete arrangements for the sale (Tr. 199). The general plan of sale was sketched by appellant (Tr. 58). This plan was followed.

Hollinger was to go to the Web bar and get the money from Betty Guido, the police woman (Tr. 59). He was then to take the money across the street to the Antler Club and deposit it in the men's rest room under the wash basin (Tr. 59). Blevins was then to pick up the money (Tr. 59). Blevins was then to get narcotics and place the narcotics in the Hoe Sai Gai restaurant in the rest room (Tr. 59). Betty Guido was to pick up the narcotics there (Tr. 64). The money was taken and hidden at the Antler Club (Tr. 62), and the police woman picked up the narcotics at the res-

taurant as provided in the plan (Tr. 59). The police woman corroborated Hollinger's testimony as to this transaction (Tr. 201).

At the time of this transaction Hollinger gave to the police woman the telephone number of appellant's apartment—WAlnut 4-4104—on a piece of paper (Tr. 64). This piece of paper was U. S. Exhibit No. 5. On January 20, 1955 the police woman testified that she called that number and talked to appellant, who told her to meet defendant Hollinger at a bar to be arranged later (Tr. 203-204). Later the police woman called appellant's apartment again and talked to Hollinger, who testified appellant had told him of her prior call (Tr. 66). Appellant was present in the apartment when the police woman called (Tr. 67). Arrangements were made to meet at the Greyhound Bus Depot at 5 o'clock (Tr. 67). Hollinger testified that appellant remarked that Betty (the police woman) "was a good customer." (Tr. 67). Appellant then drove Hollinger to 7th and Mission Streets in the vicinity of the Greyhound Bus Depot to meet the police woman (Tr. 68). Hollinger's testimony in this respect was corroborated by Agent Casey who observed appellant drive Hollinger to the Post Office Building at 7th and Mission Streets at 5:30 P.M. January 20, 1955 (Tr. 240-241). The sale was arranged (Tr. 68). Hollinger then called appellant from the Greyhound Bus Depot and informed him that they had another sale (Tr. 69). Appellant informed Hollinger that the narcotics would be available around 11 o'clock (Tr. 70). Hollinger then arranged to meet

the police woman at about 11 o'clock at the Pioneer Bar (Tr. 70). Thereafter the partners discussed arrangements for the sale and delivery in appellant's apartment (Tr. 71). The narcotics were to be delivered at the Senate Club at Larkin and Turk Streets (Tr. 71). The money was to be exchanged in the Greyhound Bus Depot (Tr. 71). Hollinger then met the police woman at the Pioneer Bar, at which time she gave him $500 (Tr. 75, 77, 192, 206). At about 1 o'clock on the morning of Friday, January 21, 1955, Hollinger took Betty to Turk and Larkin Streets and left her (Tr. 78). Hollinger then went back to appellant's apartment (Tr. 79). He then received a call from Betty that the narcotics were not at the Senate Club (Tr. 79). Both Blevins and appellant were present when this phone call was made (Tr. 79). The police woman was told to look again (Tr. 80). The police woman then picked up the narcotics at the Senate Club (Tr. 208). The police woman testified that she had looked in the wrong rest room for the narcotics (Tr. 208-209).

Miss Lutz (the police woman), by prearrangement with Police Officer Getchel, called again at appellant's apartment at 6:30 (Tr. 214). Police Officer Getchel was standing at the apartment door at that time (Tr. 282). He heard this conversation: "It was that girl again. It looks like more business. Who will chauffeur this time?" (Tr. 282).

Appellant was convicted on Counts 1, 2, 4 and 5 of the indictment (Vol. 1, Tr. 9). Appeal was then timely made to this Court.

QUESTIONS PRESENTED.

Appellant does not list in his opening brief any legal questions arising from this appeal. In our opinion, this neglect is caused by the fact that there are no substantial questions raised on this appeal.

ARGUMENT.

I. IN FEDERAL COURT CONVICTION MAY REST ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellant has confused the rule in Federal Court with the rule that obtains in the State of California. He has cited sections of the California Penal Code and cases decided by the California State Supreme Court as requiring corroboration. However, he has failed to cite one Federal case which holds that such corroboration is required in a Federal criminal case.

It is well settled by innumerable cases in this Circuit that a conviction *can* rest on the uncorroborated testimony of an accomplice.

Lung v. United States (9th Cir., 1915), 218 F. 817;

Diggs v. United States (9th Cir., 1915), 220 F. 545, affirmed 242 U.S. 470;

Hass v. United States (9th Cir., 1929), 31 F. 2d 13, cert. denied;

Ahearn v. United States (9th Cir., 1925), 3 F. 2d 808, cert. denied;

Todorow v. United States (9th Cir., 1949), 173 F.2d 439;

Westenrider v. United States (9th Cir., 1943), 134 F.2d 772;

Stillman v. United States (9th Cir., 1949), 177 F.2d 607;

Rapp v. United States (9th Cir., 1944), 146 F. 2d 548;

Catrino v. United States (9th Cir., 1949), 176 F.2d 884;

Cossack v. United States (9th Cir., 1936), 82 F.2d 214, cert. denied.

II. THE ACCOMPLICE'S TESTIMONY WAS CORROBORATED.

A reading of the facts of this case will demonstrate that the evidence against appellant was overwhelming. The co-defendant Hollinger's testimony was corroborated at every stage of the proceeding. Narcotics were found under the carpet on the stairs near appellant's apartment by the arresting officers (Tr. 248). The police woman, Miss Lutz, or Betty Guido as she was known by appellant, corroborated Hollinger's testimony at every stage. Just before appellant's arrest Police Officer Getchel overheard a conversation concerning the police woman: "It was that girl again. It looks like more business. Who will chauffeur this time?" (Tr. 282). This conversation presupposed a knowledge of the "business transactions" involving heroin with which appellant is charged in the indictment. The police woman actually talked to appellant on the telephone, and this conversation presupposed knowledge on appellant's part of the heroin transactions with which he is charged (Tr. 203). Appellant

also was observed driving the defendant Hollinger to meetings for the sale of narcotics (Tr. 240-241, 245).

There was sufficient evidence in the record to convict appellant if Hollinger had not testified for the government at all.

III. THE COURT DID INSTRUCT ON THE EFFECT OF THE TESTIMONY OF AN ACCOMPLICE.

Appellant did not comply with Rule 30 of the Federal Rules of Criminal Procedure by objecting to instructions. This rule provides in part as follows:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

Mr. Bramy, appellant's counsel, when asked whether he had any exceptions, declared that he had "none" except that he joined in counsel for Blevins' exception with reference to a defense instruction on the subject of overt acts (Tr. 426).

By failure to make any objection, appellant may not raise any objections on appeal. However, appellant's contention suffers even a graver defect. The instruction he claims the Court erroneously failed to give was in fact given. At page 418 in the transcript the Court gave the following instruction:

> "An accomplice is defined to be one concerned with another or others in the commission of a crime. It is a settled rule in this country that

even accomplices are competent witnesses, and that the Government has a right to use them as such. It is the duty of the court to admit their testimony and the jury must consider it.

"The testimony of accomplices, however, is always to be received with caution and weighed and scrutinized with great care and the jury should not rely on it unsupported unless it produces in their minds a positive conviction of its truth. If it does, the jury should act upon it."

This instruction seems to go even farther than two instructions expressly approved by this Court.

Stillman v. United States (9th Cir., 1949), 177 F.2d 607, 616;

Cossack v. United States (9th Cir., 1936), 82 F.2d 214, 217.

IV. THE COURT WAS NOT REQUIRED TO TRY APPELLANT'S CASE FOR HIM.

Appellant makes some contention that counsel at the trial did not properly represent him. No attack is made upon the competence of counsel, but appellant's counsel feels that the case should have been tried in a different manner. He seems to imply that the trial judge should have entered into the proceedings in some way to the advantage of appellant. What actually appellant desired the trial judge to do does not appear in appellant's brief. He makes some vague mention of leading and suggestive questions but does not bother to inform this Court or appellee what

questions are objectionable. Appellant's contentions in this respect are flimsy, unsubstantiated and approaching the frivolous if, indeed, they have not reached it.

CONCLUSION.

The evidence in this case was overwhelming. Appellant was properly convicted. His appeal is without merit. The judgment should be affirmed.

Dated, San Francisco, California,
December 16, 1955.

Respectfully submitted,

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JOHN H. RIORDAN, JR.,
Assistant United States Attorney,

RICHARD H. FOSTER,
Assistant United States Attorney,

Attorneys for Appellee.

No. 14812.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Pleadings.

Appellant was charged in an indictment filed in the United States District Court, in and for the Southern District of California, with a violation of U. S. C., Title 18, Section 1709—Theft of Mail by Postal Employee [Clk. Tr. p. 2]. Defendant entered a plea of not guilty as charged in the Indictment [Clk. Tr. p. 3].

The matter proceeded to trial before a jury [Clk. Tr. p. 4]. Appellant was found guilty as charged [Clk. Tr. p. 7]. Appellant was sentenced to three years in prison [Clk. Tr. p. 12].

This is an appeal from the judgment rendered against defendant [Clk. Tr. p. 17].

Basis of Jurisdiction.

It is contended that the District Court had jurisdiction by virtue of Title 18, Section 546 U. S. C., and this Court has jurisdiction to review the judgment in question by virtue of Title 28, Sections 41(2) and 225(a) U. S. C.

Statement of Case.

This is a case wherein defendant and appellant, James Gresham, was charged with theft of mail. He entered a not guilty plea and trial was by jury. After the trial, the matter was submitted to the jury for a verdict on February 28, 1955, at 9:09 A. M. At 2:20 P. M. the jury returned to Court and requested further instructions. The Court instructed the jury further, and at 2:55 P. M. the jury retired to deliberate further. At 4:00 P. M. the jury returned to Court and stated that it was deadlocked. The Court requested the jury to deliberate further and *at this time the Court further charged the jury.* At 4:15 P. M. the jury retired to deliberate further. At 4:40 P. M. the jury returned to Court with a verdict of guilty [Clk. Tr. p. 14].

Specifications of Error.

1. The comments, remarks and conduct of the trial judge were calculated to coerce, command or influence the jury to reach a verdict which prevented Appellant from having a fair and impartial trial in violation of his Constitutional rights.

ARGUMENT.

I.

The Trial Court Coerced the Jury Into Arriving at a Verdict.

The following proceedings were had:

"The Court: The jury has returned to the court-room. The defendant is present with counsel. The prosecutor is here.

Mr. Foreman, what seems to be the difficulty now?

The Foreman: Your Honor, there seems to be—

The Court: Don't tell me how the jury stands numerically, but is there some way in which we can help you?

The Foreman: I don't think so, your Honor. There are quite a number of things, relative to the situation, that some of our jurors can't meet eye to eye, and I don't believe the barrier could be broken through.

The Court: When that has happened before the judges here quite generally give an instruction which I will try to remember for you. I am going to ask you to try again for a little while.

It appears that this jury has what is commonly called a deadlock. I hope you don't really have one. I have been sitting here now into my fourth year and I have only had one deadlocked jury out of many jury trials, both civil and criminal.

You should bear in mind that each of you has, while an individual juror, been selected because of an appraisal made by the prosecutor and an appraisal made by the defendant, appraisal made by the court that you are reasonable persons. That you are capable of making decisions and that you are not inclined to be stubborn.

Now, since each one of yau had been selected with that in mind by Mrs. Bulgrin, by Mr. Woolsey, by the defendant, by me, it would seem that you either can break through the barrier or some one of you, or more of you, have not turned out to be the type of jurors we thought you were.

This is not a long case, nor a particularly difficult one. It seems to me the main difficulty you have is that the case hangs entirely on circumstantial evidence.

Now, the law makes no distinction between circumstantial evidence and other evidence, except that in order to warrant a verdict of guilty the evidence must be consistent only with guilt, and inconsistent with any reasonable hypothesis of innocence.

Now, you remember what the evidence was. If you don't, we can have it read to you. It is a matter of considerable effort for the lawyers to go through a case of this kind. If you disagree, it is going to call upon the attorneys to put in another day trying the case, and require the services of another jury; a lot of waste of time. While we don't pay you much, it is some drain on the budget that is voted on a rather miserly basis by the Congress to take care of this sort of thing.

Won't you please go back to the jury room and each of you bear in mind that the jurors who are opposed to your way of thinking were selected in the belief that they were as reasonable as you and you as reasonable as they. Start out fresh and see if you can't come to a verdict. If you can't, I will discharge you shortly after 5:00. But being the quality people you are, I take it that you will be able to get together.

You should bear in mind that no one should surrender a firm conviction, if you have that, but you ought to recanvass your thoughts, all of you. Each and every one of you should canvass your thoughts

regarding the case, in the lights of the fact that other people who are presumptively reasonable as you are feel otherwise. Try to talk it over again, and we will keep you here until a little after 5:00.

Now, do you have anything we can help you with before sending you back?

The Foreman: I might say that we have been working on this thing from this morning. I am not going to advise your Honor how many ballots we have taken, or anything of that nature. But the statements were made that we are hopelessly deadlocked up to this present moment. Whether it will do any good to go back or not I don't know. We might try, at your suggestion.

The Court: I wish you would try. Try it briefly, and anyone who has a very firm conviction, after the new discussion, should not surrender it simply because there are a large number of jurors of a different persuasion.

Let's see if the jury are all of the mind of the foreman. Start out with No. 1. Do you think, Juror No. 1, there is a possibility you might agree?

Juror Graff: No, your Honor.

The Court: Juror No. 2, do you think so?

Juror Chandler: Judging from the day's voting, I think there is going to be no change.

The Court: Juror No. 3?

Juror Enders: I think there is a possibility.

The Court: Juror No. 4?

Juror Steele: A very slight possibility, sir.

The Court: No. 5?

Juror Gibbs: I doubt it.

The Court: No. 6?

Juror Durand: I doubt it.

The Court: No. 7?

Juror Kimbrell: I doubt it.

The Court: No. 8?

Juror Danely: In view of one remark, your Honor, I am fairly certain there is no possibility.

The Court: No. 9?

Juror Lowe: I think that we might.

The Court: No. 10?

Juror Rosenau: I think we might, also.

The Court: No. 11?

Juror Codon: I still have faith in the human element.

The Court: No. 12?

Juror Ray: I doubt it, sir.

The Court: There is an instruction that Judge Harrison in the next courtroom almost always gives to juries, which goes somewhat in tenor like this: That it is seldom productive of good for a juror in the jury room to announce with any force a belief in a particular position, because it is only human, when we say we believe a certain thing to be so, to tend to thereafter argue for the premise that we have set forth. And to emphatically assert you believe one position or the other is to call upon your subconscious to argue for the upholding of that premise. But that is something that is common to advocates or lawyers in the courtroom. It isn't an attribute of judges, and you people are judges; so far as the facts of this case are concerned you are only judges. The Court of Appeals cannot reverse any decision you make on the facts.

You are judges of the court, so far as the facts are concerned, much more so than I, more so than Chief Justice Warren. And being judges, you should try to act like judges.

So you may retire and try again" [Rep. Tr. pp. 161-166].

In *Kesley v. United States,* 47 F. 2d 453, the Court had a case where a situation similar to the instant case was presented to the Court for decision. In reversing the conviction the Court said:

> "There must be no coercion outside of the force of reason and advice as to the facts. *People v. Sheldon,* 756 N. Y. 268. Thus while the length of time the jury may be kept together is discretionary with the judge, he cannot threaten them with such imprisonment. *State v. Place,* 20 S. D. 489. The judge may urge the minority to carefully consider the fact that they are in the minority in reviewing the correctness of their position. *Allen v. United States,* 164 U. S. 493. But comments, not upon the evidence, but reflecting on the jurors, are not permissible. *People v. Sheldon, supra; Hagen v. N. Y. Central R. R.,* 79 App. Div. 519. In *State v. Bybee,* 17 Kan. 462 Justice Brewer said: 'No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity. Personal consideration should not influence his conclusions; and the thought of them should never be presented to him as a motive for action.' Because of the imputation of stubbornness, or worse, which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error *per se* in the Courts of the United States. *Brashfield v. United States,* 272 U. S. 448. Much more serious is an imputation by the judge that some of the jurors are forgetting their oaths. It might even be interpreted as a threat of punishment as for contempt of Court."

See:

Lively v. Sexton, 35 Ill. App. 417.

A judge may advise, and he may persuade, but he may not command, unduly influence, or coerce.

Wissel v. United States, 22 F. 2d 468.

After a jury reports a failure to agree and there are dissenting jurors, it transcends the proper limits of judicial discretion and authority for the trial judge to characterize the dissenting jurors as "contrary," and to declare that there should be no trouble about agreeing on a case like this one before them, and that it simply called for the sensible reasoning of men according to the evidence.

People v. Carder, 31 Cal. App. 355.

See:

People v. Kindleberger, 100 Cal. 367.

Admonitions to the jury as to the importance of agreement, which referred to the expense of a retrial of the cause, held to be erroneous.

Peterson v. United States, 213 Fed. 920;
State v. Chambers, 9 Ida. 673;
State v. Clark, 38 Nev. 304.

Statements and instructions which have the effect of unduly hastening the rendition of a verdict should never be made or given.

Peterson v. United States, supra;
Edwards v. United States, 7 F. 2d 598.

See:

Maury v. State, 68 Miss. 605.

For the Trial Court to give instructions or to make statements to the jury which reflect on their honesty, integrity, or intelligence as jurors is improper.

Boyett v. United States, 48 F. 2d 482.

Further, the rule has been laid down that inquiry by the Trial Court as to the numerical division of the jury constitutes reversible error.

Brashfield v. United States, 272 U. S. 448;
Stewart v. United States, 300 Fed. 769;
Nigro v. United States, 4 F. 2d 781;
Weiderman v. United States, 10 F. 2d 745;
Jordan v. United States, 62 F. 2d 966;
Berger v. United States, 62 F. 2d 438;
Burton v. United States, 196 U. S. 283.

It is the contention of Appellant that jurors have a right to disagree. When, after a jury announce that they cannot agree, and the Court makes such remarks as hereinbefore set forth, and the jury immediately return a verdict of guilty, it is clear that such remarks coerced the jury. The public interests never require that a jury shall be coerced to an agreement upon a verdict. When a judge makes such remarks as herein complained of, he impairs their freedom of action.

In the instant case the Court told the jury that during his four years on the bench he had never had but one deadlocked jury. This was a matter of no concern to the jury. What could such a remark reasonable imply? The implication is that this was the stupidest jury that he had ever had. Also his remarks were further calculated to imply that the jurors were not reasonable persons and were stubborn in not reaching a decision. His remarks further carried the indication that the jurors were not intelligent or honest when he told them that "it would seem that you either can break through the barrier or some of you, or more of you, have not turned out to be the type of jurors we thought you were."

His remark that the case was not a particularly difficult one and that the main difficulty they had is that the case hangs entirely on circumstantial evidence was purely his opinion and invaded the province of the jury. How could the Court know whether the case was difficult for the jury to determine, or that their main difficulty was the fact that the case hung entirely on circumstantial evidence?

The Court further emphasized that it would be a "lot of waste of time" to have a second trial, regardless of the innocence or guilt of defendant. The Court further indicated that he desired them to reach a verdict by 5:00 o'clock. That all of the foregoing remarks were prejudicial is shown by the fact that after twenty-five minutes of further deliberation the jury returned a verdict of guilty.

It is to be noted that an inquiry by the judge numerically as to the possibility of reaching a verdict showed that seven members were of the opinion that no verdict could be reached. This was their conclusion after a day of deliberating. Yet, after the statement of the trial judge a verdict was reached in 25 minutes. This, plus the fact that no further evidence was presented clearly indicates that a verdict was arrived at by reason of the coercion of the trial judge.

A practice ought not to grow up of inquiring of a jury, when brought into Court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended because we cannot see how it may be material for the Court to understand the proportion of

division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge, or permits such a question on the part of the trial judge.

No juror should be influenced to a verdict by fear of personal criticism, possible disgrace, or pecuniary injury. No juror should be induced to assent to a verdict by a fear that a failure to agree would be regarded by the public as reflecting on either his intelligence or his integrity, or as a failure to perform properly a public duty. Personal consideration should never be permitted to influence a juror's conclusion.

Sharp v. State, 115 Neb. 737.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be reversed.

Respectfully submitted,

Walter L. Gordon, Jr.,
Attorney for the Appellant.

No. 14812

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GRESHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On January 19, 1955, an indictment was filed against the appellant in which the Grand Jury for the Southern District of California charged him with a violation of 18 U. S. C., Section 1709, in that he stole a letter, while a post office employee, which came into his possession intended to be conveyed by mail. The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all the District Courts original jurisdiction "of all offenses against the laws of the laws of the United States."

After a trial was held on February 25, 1955, the Honorable Ernest A. Tolin, Judge Presiding, the jury found the defendant guilty as charged on February 28, 1955. On March 31, 1955, a notice of appeal to this Honorable Court was filed. Thereafter, on April 29, 1955, a Designation of Portions of Record to be Contained in Record

on Appeal was filed by the appellant in the District Court. On May 23, 1955, this Court filed an order upon application of the appellant for the prosecution of the appeal on a typewritten record and for the consideration of the exhibits as part of the record without copying them into the record. A concise statement of the points on which appellant intended to rely was not filed with this Court upon the filing of the record as required under the rules of this Court, Rule 17.6.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

The Statute Under Which the Defendant Is Being Prosecuted.

The indictment in this case is brought under Section 1709 of Title 18, United States Code, which provides in its pertinent part:

> "§1709. Theft of mail matter by postmaster or employee.
>
> "Whoever, being a postmaster or Postal Service employee, embezzles any letter, postal card, package, bag, or mail or any article or thing contained therein intrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III.
Argument.

The Government respectfully submits on the following grounds that the District Court did not err in his instructions to the jury. There is nothing in the record that shows that the remarks of the trial court were calculated to or did in any manner coerce, command or influence the jury to reach a verdict which prevented appellant from having a fair and impartial trial.

The trial of this matter was commenced on Friday, February 25, 1955, at 9:40 a. m. The proceedings consumed the entire Court day and from approximately 4:30 p. m. to 5:00 p. m., a substantial part of the instructions were given. (It appears that the time of 2:05 p. m. noted at the top of page 136 of the Reporter's Transcript of Proceedings relating partially to instructions given on the 25th is in error since the other portion of the transcript containing evidence given at the trial on the same day indicates that the Court finished taking evidence close to 4:00 p. m. This writer's recollection is also in accord with the latter time.) From approximately 4:00 to 4:30 p. m. oral argument was given followed by instructions to the jury. A recess was taken at 5:10 p. m. to Monday, February 28, 1955, for further instructions and deliberation. Thus, the trial appears to have consumed almost five hours, 12 witnesses having testified, 8 for the government and 4 for the defendant as shown by the 133 pages of transcript.

We find at page 133 of the Reporter's Transcript of Proceedings, that the Court stated to the jury on Friday, the 25th of February, 1955:

> "I am agreeable to putting it over to Monday morning. * * * we can have you in at 9:00 on Mon-

day morning and *you can have all day, if you need it, for discussion of the case.*"

The jury decided to choose the latter (rather than to deliberate on Friday evening) and came back on Monday morning, the 28th, to finish the case.

On Monday, February 28, 1955, the Court convened at 9:05 a. m. [Rep. Tr. p. 146.] Judging from the Reporter's Transcript of Proceedings, pages 146-148, the jury must have commenced its deliberation at approximately 9:30 a.m. on the 28th. (The Transcript of Record containing the minutes of the Court indicate that the bailiff was sworn at 9:09 a.m., but we do not take this to be the time the deliberation began since it is difficult to see how the colloquy could have taken place in only four minutes. [Rep. Tr. p. 7].) At any event, the jury was taken to lunch, presumably from 12 o'clock to 2 o'clock, and returned to Court for further instructions at 2:20 p.m. Thus, they deliberated between two and one-half to three hours, before they first came back into Court for instructions. The jury requested that the Court define reasonable doubt and circumstantial evidence. There were no exceptions to the instructions as given. [Rep. Tr. p. 154.] The third question was "please define what reasonable doubt of circumstantial evidence means." [Rep. Tr. p. 154.] No answer was given since it had been covered by the responses to the two previous questions. The fourth question was "Does it make any difference as to the amount of marked money found on the defendant?" [Rep. Tr. p. 154.]

The Court stated:

"It doesn't make any difference how much. * * * The evidence relating to the marked money was simply evidence of design to show that he had gotten

into the mails, otherwise, it was a prosecution theory, he wouldn't have had that marked money in his possession. Now, that was the prosecution theory. *Whether it is valid or not, it is for you to say. But that was the theory.*" [Rep. Tr. p. 155.]

The last question was:

"Did Assistant Superintendent at Palms Post Office bring to Superintendent's office one mail bag or mow many?" [Rep. Tr. p. 146.]

Counsel for both parties worked out an answer together which advised the jury that it had been only one mail bag which was brought into the post office." [Rep. Tr. p. 160.]

At the end of the answer to each question, the foreman of the jury indicated that the question had been answered to the satisfaction of the jury. [Rep. Tr. pp. 151, 154-155, 160.] There were no other questions from the jury. [Rep. Tr. p. 160.]

The Transcript of Record indicates that at 2:55 p.m. 30 minutes after they came in for instructions, the jury again retired to deliberate. [Rep. Tr. p. 7.]

At 4:00 p. m., one hour later, the jury returned to the courtroom. From the record, it appears the jury had deliberated altogether close to four hours when it came back at 4:00 p. m. At that time the Court said:

"*Don't tell me how the jury stands numerically,* but is there any way in which we can help you."

The foreman advised the Court that he did not think so since some of the jurors did not see "eye to eye" and he did not believe the "barrier could be broken through." There followed further instructions from the Court to the jury and a discussion with the foreman and other mem-

bers of the jury which appears to be accurately reproduced in appellant's opening brief. Therefore, it will not be again reprinted herein. [Rep. Tr. pp. 161-166.] However, appellee wishes to emphasize certain portions of this discourse. As stated above the Court specifically instructed the jury not to state how the jury stood numerically. He further stated:

> "Won't you please go back to the jury room and each of you bear in mind that the jurors who are opposed to your way of thinking were selected in the belief that they were as reasonable as you and you as reasonable as they. Start out fresh and see if you can't come to a verdict. If you can't I will discharge you shortly after 5:00. But being the quality people you are, I take it that you will be able to get together."

However, the Court admonished the jury as follows:

> *"You should bear in mind that no one should surrender a firm conviction,* if you have that, but you ought to recanvass your thoughts, all of you. Each and everyone of you should canvass your thoughts regarding the case, in the lights of the facts that other people who are presumptively reasonable as you feel otherwise. Try to talk it over again and we will keep you here until a little after 5:00." [Rep. Tr. p. 164.]

The Court then asked each member of the jury whether he or she thought there was a possibility an agreement might be reached. Five jurors out of the 12 indicated they believed an agreement might be accomplished. The Court did not indicate which agreement would be desirable, he only stated "do you think * * * there is a possibility you might agree." [Rep. Tr. p. 164.] There is not one word in all his remarks which could be taken to mean that the jury bring in a verdict of guilty.

The seven jurors who indicated they doubted any agreed could be reached would logically seem to have been divided on their opinion as to a verdict of guilt or acquittal. But we do not even have any sure way of knowing how the other five jurors stood particularly in view of Juror Condon's remark, "I still have faith in the human element." In other words, it could not be said in any light to have been a poll of the jurors as to how they stood numerically as to acquittal or guilt, as claimed by appellant. Any such position is actually the result of sheer conjecture and surmise. All of the cases cited by him on page 9 of his opening brief relate to numerical polls of juries as to how they stood on the question of conviction or acquittal. The trial court here was merely attempting to ascertain whether or not a true deadlock existed, without any hope of reaching an agreement. Certainly it was within his province to make such an inquiry and to send the jurors out again when five of them, regardless of how they stood for guilt or acquittal, indicated there was a possibility of reaching an agreement.

After receiving the above instructions from the Court, the jury returned to deliberate further. At 4:40 p. m., 20 minutes later, which was not a short period of time compared to the total period consumed in deliberation, they returned with a verdict of guilty. They clearly did not respond with the verdict because of any threat of being kept unduly by the Court until an agreement was reached. As set forth above, the Court had initially indicated that the jury could have all day Monday as needed, and, again on Monday, a little after 4:00 p. m., he told them that if they could not agree on a verdict, they would be discharged shortly after 5:00 p. m. that day. The Court's exortation had been firmly put as follows: "* * * No one should surrender a firm conviction * * *." His

suggestion to them, in view of the fact that some jurors thought there was a possibility of reaching a verdict was to

> "* * * canvass your thoughts regarding the case, in light of the fact that other people who are presumptively reasonable as you are feel otherwise. Try and talk it over again * * *." [Rep. Tr. p. 163.]

All of the questions, except the last, which were asked by the jury indicated they had probably spent the morning pondering instructions of law upon which they were confused. Thus, it was only reasonable for the Court to request them to discuss the matter further, particularly since the case was not long or complicated and the jury had not been out more than a few hours altogether. It is apparent that one or more of the jurors upon retiring to the jury room for the last time reconsidered the position which he or they had taken and decided that it had been an unreasonable one and that, in accordance with the Court's instructions on circumstantial evidence and reasonable doubt and all of the evidence in the case, the verdict must be one of guilt.

Recently on April 19, 1955, this Court affirmed a conviction in a case which had been tried before the Honorable William C. Mathes, Judge of the District Court for the Southern District of California, Central Division, in the case of *Salvador Vernal-Sazueta v. United States of America,* No. 14,598. During the course of that trial, which was somewhat more complex in nature than the instant case, the Court at various times instructed the jury concerning their conduct in arriving at a verdict. Judge Mathes stated as follows:

> "In the course of your deliberations, do not hesitate to re-examine your own views and change your

opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for mere purpose of returning a verdict."

Thereafter the jury returned again unable to agree. The Court further told them:

"Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence, but remember always that after full deliberation and consideration of the evidence, it is your duty to agree upon a verdict, if you can do so, without violating your individual judgment and your conscience."

Originally, after having deliberated for about two hours, the Court received a note from the foreman stating that it appeared the jury could not agree to a unanimous verdict since no juror had changed his or her mind since the first ballot. The jury finally reached a verdict at approximately noon the next day, but, before sending them home for the night, the Court instructed them as follows:

"* * * the defendant should not be put to the expense of trying this case again. The government should not be put to the expense of trying this case again. If I did not feel that you people—I am not criticizing you; sometimes juries get off to a strange start. But I just do not see any reason why you cannot find the truth as to the facts here in this case.

"Now I don't want you to feel that you are under any pressure, you are prisoners and you are going to have to stay until you reach some kind of verdict. But I do want you to give yourself every opportunity so that the defendant, as well as the Government, won't have to try this case again. You see, it is ex-

> pensive to both sides; to say nothing of the ordeal of going through, for everybody concerned, and the witnesses who are involved. It takes enough time to try each case once."

The facts of that case, although more complex than the one under consideration herein, were not complicated in the real sense of the word. But the trial court after years of experience with individual jurors and jurors as a panel must have developed a realization and an awareness of the problems that a jury encounters during the course of its deliberation in attempting to achieve a just verdict. For some of them it may be their first time of participation in such a proceeding and the trial court might well determine that some further deliberation might be effective in helping them to see their duty in its true perspective. The Court might also feel that the jury was not diligent in seeking to settle its differences. In the case at bar one of the jurors, or perhaps more than one, may have realized that a position taken had been completely unreasonable or based upon a misconception of fact or law. Such an awareness might have dawned within a few seconds after the jury returned for the final time to the jury room. It may have been a word or some phrase which was spoken by one of the other jurors which suddenly convinced the one or ones who changed their mind that they had been laboring under a misapprehension or upon an unreasonable basis.

The government respectfully submits to the Court that all of the cases which have been cited by appellant in this opening brief on pages 7, 8 and 9 can be distinguished from the facts in this matter. In *Kesley v. United States,* 46 F. 2d 453 (5 Cir., March 5, 1931), the District Court

was dealing with a "hung" jury. He stated that it was apparent to him some of the jurors were violating the sacredness of their oaths and further that there was very little doubt as far as the facts were concerned. The jury came in with a verdict of guilty within a few minutes thereafter. It is interesting to note that the Court of Appeals at page 454 stated *"The Judge may urge the minority to carefully consider the fact that they are in the minority in reviewing the correctness of their position* * * * but comments, not upon the evidence, but reflecting on the jury are not permissible. * * * Much more serious is an imputation by the Judge that some of the jurors are forgetting their oaths. It might even be interpreted as a threat of punishment for contempt of court." In other words, in this case the Court had imputed that the jury as a body had forgotten its integrity and even worse might be subject to punishment as for contempt of court. There is no such question in this case.

On page 8 of his brief, appellant cites a case of *Wissel v. United States,* 22 F. 2d 468 (2 Cir., Nov. 14, 1927). In that case the Court had first instructed the jury in part "* * * I feel the case is of such importance that it will be necessary to keep you together until you can have agreed, or until you do agree upon a verdict. You may retire, gentlemen, and return your verdict." In spite of this strong statement that they would be kept together until a verdict would be agreed upon, the Court of Appeals stated an exception to the instruction was without merit for no complaint could have been made to its fairness and accuracy with respect to the jury's duty. However, subsequent to the above charge, the Court had instructed the jury further, which the Court of Appeals

held resulted in the effect of telling them that a verdict of not guilty was setting at defiance law and reason. "It was by indirection doing what the law is adjudged to do directly—direct a verdict of guilty." In the within case, there was no indication whatsoever that the Court had made any reference, either directly or indirectly, to the kind of verdict which the jury should bring in. His only effort was to suggest that they endeavor to reach an agreement. Further, he promised to discharge them at the end of the Court day if no such accomplishment was effected. In the case of *Peterson v. United States,* 213 Fed. 920 (9 Cir., May 11, 1914), Judge Dietrich considered a specification of error involving the first count which he stated was "the only one we need now consider." However, later in the opinion, he did turn to another instruction which had been complained of. Again, this holding can be distinguished from the case under consideration herein. The foreman of the jury had reported that they had been unable to agree as to two of the defendants and the Court further instructed as set forth on page 924 of the opinion. Judge Dietrich remarked on the same page:

> "And, in the most favorable view that can be taken of it, the evidence was doubtfully sufficient to warrant a conviction. Already one jury had been unable to reach an agreement, and this jury had spent many hours in a vain attempt to get together. * * *
>
> It appears here inquiry was first made of the jurors as to how they were divided, and it was thereupon disclosed that they stood 5 to 7. * * *"

The Court cited the *Burton* case which had reversed because of a similar inquiry. After discussing the disclosure

here of a numerical division as to guilt or acquittal the Court stated that:

> "But here, without cautioning the jurors against yielding their honest, conscientious convictions, whatever they may have been, to mere numbers or to considerations of economy, the presiding Judge unqualifiedly told them that 'the case should be finally disposed of as to all' defendants. * * * The Court might very well have expressed the hope for such an agreement, but it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. It is to be borne in mind that nowhere did the Court make it clear that, however desirable it might be to avoid another mistrial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors."

In the instant proceeding, Judge Tolin had carefully instructed the jury more than once that the individual jurors should not surrender an honest conviction simply because a large number of jurors might be of a different persuasion.

In *Edwards v. United States,* 7 F. 2d 598 (8 Cir., July 28, 1955), the jury had deliberated for 24 hours after submission of the case. After being brought into Court they reported their inability to agree and that they had made no substantial progress. The Court had then asked the foreman whether the dispute involved a matter of law and he was advised in the negative. However the Court went ahead and treated it as though the dispute involved a matter of law and, as stated by the Court of Appeals, "concluded with language which we think at least in some degree calculated to coerce a verdict. It

must be remembered that the facts were not complicated and the dispute must have necessarily been drawn to a very fine line. The jury had deliberated for 24 hours and reported substantially no progress; that is 'we are about where we started.' " As we have pointed out previously, Judge Tolin endeavored to answer the jury's questions as concisely as possible and, in fact, no exceptions were noted to the instructions relating to reasonable doubt and circumstantial evidence. He constantly emphasized that the jury should bear in mind that no one of them should surrender a firm conviction merely because others in the majority might be of a different opinion.

In *Boyett v. United States,* 48 F. 2d 482 (5 Cir., April 8, 1931), the Court stated that "when it is apparent that doubt exists in the minds of the jury, after having received the charge of the Court and returned to deliberate, in delivering additional charges the Judge should exercise caution and refrain from indicating to the jury his own opinion as to the guilt or innocence of the defendant. It is also his duty to refrain from any intimidation or coercion of the jury." Here, there was at least substantial evidence to support the conviction of the defendant and in fact it appears that the evidence was overwhelming against him. The questions asked by the jury seemed to indicate that their discussions had revolved almost completely around matters of law. As Judge Tolin stated "it seems to me that the main difficulty you have is that the case hangs entirely on circumstantial evidence." [Rep. Tr. p. 162.] The Court then went on to state that the law makes no distinction between circumstantial and other evidence, "except that in order to warrant a verdict of guilty the evidence must be consistent only with guilt, and inconsistent with any reasonable hypothesis of innocence." It was shortly after this statement that the

jurors went out to deliberate for the last time. It may have been that previously they had not realized circumstantial evidence which is consistent only with guilt would be sufficient to justify a verdict of guilty. With this proper instruction on the law, it was then possible for them to discuss the facts accordingly.

In *Suslak v. United States,* 213 Fed. 913 (9 Cir., May 4, 1919), Judge Dietrich again considered the propriety of instructions given after the jury had been out for some time. The judgment of conviction was affirmed.

The instruction given had been as follows: The Court held at page 919:

> "It is not an uncommon practice, and it is entirely within the discretion of the court, to recall the jury for the purpose of giving additional instructions. Perhaps the language employed is as strong as should ever be used in impressing upon a jury their duty, if possible, to reach unanimity by a fair consideration of each other's arguments, but in its general purport and spirit the instruction is not out of harmony with the common practice, and is abundantly supported by the decided cases. Allis v. United States, 155 U. S. 117."

In *Shea v. United States,* 260 Fed. 807 (9 Cir., Oct. 6, 1919), Judge Gilbert of this Court once more affirmed, although error was assigned to additional instructions given after deliberation had commenced. The Court stated at pages 808 and 809:

> "We do not think that the instruction here in question was more coercive or more invasive of the province of the jury than the instructions to the jury in United States v. Allis (C. C.), 73 Fed. 182, which was approved in Allis v. United States, 155 U. S.

117, 15 Sup. Ct. 36, 39 L. Ed. 91, where the court said:

'It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment.' Again in Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, the court approved an instruction of the court in which the jury were told it was their duty to decide the case if they could conscientiously do so, and that they should listen, with a disposition to be convinced, to each other's arguments; that in case the larger number were for conviction, a dissenting juror should consider why, if his doubt was a reasonable one, it made no impression upon the minds of so many other men equally honest and equally intelligent with himself.

* * * * * * * *

In Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391, this court reviewed and held proper instructions to the jury not dissimilar from those which are here under review.

The plaintiff in error relies upon Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398, in which we held certain instructions to the jury reversible error. In that case the court had inquired of the jurors as to how they were divided, and was informed that they stood five to seven; thereupon the court said to the jury, among other things, 'The government has a right * * * to a verdict without further expenditure of time and money,' and in conclusion the court expressed the belief that the jurors

could honestly come to an agreement. We adverted to the fact that nowhere did the court make it clear that, however desirable it might be to avoid another trial and finally to terminate the prosecution, an agreement should not be reached in violation of the honest conviction of any one of the jurors.

* * * * * * * *

But at the same time the court charged the jury that if they had a reasonable doubt of the defendant's guilt they should acquit him, and took pains to impress upon the jury that nothing that had been said should be understood as seeking to influence the conscientious and honest opinion which they or any one of them as reasonable men might entertain."

Conclusion.

It is respectfully submitted that the trial court did not err in its instructions to the jury and therefore the judgment of conviction should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,
LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,
LEILA F. BULGRIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 14813

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

vs.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —9-28-55

No. 14813

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

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Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

DUNNE, DUNNE & PHELPS,

333 Montgomery Street,
San Francisco, Calfornia,

Attorneys for Defendant and Appellant.

HEPPERLE & HEPPERLE,

1906 Hobart Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee

In the District Court of the United States, Northern District of California, Southern Division

No. 33393

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Plaintiff complains and alleges that:

I.

Plaintiff is the duly appointed, qualified and acting special administratrix of the Estate of Arthur V. Heavingham, deceased; letters of special administration were issued to her on the 5th day of March, 1954, and ever since said plaintiff has been, and now is the duly appointed, qualified and acting special administratrix of the estate of said decedent.

II.

At all times herein mentioned defendant, Southern Pacific Company, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant, at all times herein mentioned, was, and now is, engaged in the business of a common carrier by railroad in interstate commerce, near the station of Davis, County of Yolo, State of California.

III.

At all times herein mentioned, defendant was a common carrier by railroad, engaged in interstate commerce, and decedent was employed by defendant in such interstate commerce, and the injuries sustained by him, hereinafter complained of, arose in the course of and while decedent and defendant were engaged in the conduct of such interstate commerce.

IV.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq.

V.

On or about February 24, 1954, at or about the hour of 2:32 o'clock a.m., decedent Arthur V. Heavingham was regularly employed by defendant as the head brakeman of a freight train being operated by the defendant between its stations of Suisun and Roseville, California, and more particularly near defendant's station of Davis, County of Yolo, State of California, and was required to and did, in pursuance of his duties as head brakeman ride in the locomotive of said freight train.

VI.

At said time and place defendant carelessly and negligently, in the darkness and in dense fog, stopped on the tracks ahead of said freight train another freight train, and defendant, through its agents and servants other than decedent, carelessly

and negligently ran said freight train, on which decedent was so employed, into and against the rear of said other freight train with such force and violence as to wreck and destroy the locomotive of the freight train decedent was so riding and the caboose at the rear of said other freight train.

By reason of defendant's negligence aforesaid and said wreck and collision, decedent was imprisoned for hours in said wreckage and was so injured and scalded by live steam that after conscious and horrible suffering he died.

VII.

Said decedent died as the direct and proximate result of the carelessness and negligence of defendant aforesaid and said death occurred on the 24th day of February, 1954.

VIII.

Between the time of said accident and injuries sustained by decedent and his death he was conscious and suffered excruciating pain and mental anguish, to plaintiff's damage herein in the sum of $50,000.00.

IX.

Plaintiff is the surviving widow of said decedent, and Kathleen Heavingham is the minor surviving child of said decedent.

Plaintiff and said minor child were entirely dependent upon the earnings of said decedent for their maintenance and support.

X.

At the time of the death of decedent aforesaid, said decedent was a well and able-bodied man of the age of 56 years, and was earning and receiving from his employment with defendant a regular salary of approximately $600.00 per month, all of which he contributed to the support of plaintiff and said minor surviving child, Kathleen Heavingham.

XI.

By reason of the facts hereinbefore set forth, plaintiff has been generally damaged in the sum of $200,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of two hundred fifty thousand dollars ($250,000.00), and for her costs of suit herein incurred.

/s/ HEPPERLE & HEPPERLE
/s/ HERBERT O. HEPPERLE
/s/ ROBERT R. HEPPERLE

Trial by jury of all of the issues in the above-entitled action is hereby demanded.

/s/ HEPPERLE & HEPPERLE
/s/ HERBERT O. HEPPERLE
/s/ ROBERT R. HEPPERLE

[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein, shows as follows:

I.

Admits as follows:

At all times mentioned in the complaint and herein, defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California and in other states and engaged in the business of a common carrier by railroad in interstate and intrastate commerce in said State of California and in other states.

On or about February 24, 1954, at or about the hour of 2:32 a.m., the decedent Arthur V. Heavingham was employed by defendant as head brakeman on a freight train being operated by defendant between its stations at Suisun and Roseville, California, and in pursuance of his duties decedent was riding in the locomotive of said freight train.

Defendant Southern Pacific Company admits that the freight train upon which decedent was employed was carelessly and negligently operated into and against the rear of another freight train and that in said collision Arthur V. Heavingham was killed.

Defendant admits that decedent Arthur V. Heav-

ingham earned and received from his employment with defendant during the year of 1953 a net amount of $408 per month after withholding tax.

II.

Defendant Southern Pacific Company is without knowledge or information sufficient to form a belief as to the allegations of the complaint with respect to surviving dependents, decedent's contribution to said dependents, if any, or decedent's general health prior to the accident. Defendant denies each and every allegation of the complaint not hereinabove admitted or denied.

As and for a second, separate and independent answer and defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. Defendant Southern Pacific Company is informed and believes and upon such ground alleges that decedent Arthur V. Heavingham was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself in and about and in respect of said train and his duties thereon. Said negligence and said conduct of decedent, as aforesaid, proximately caused and contributed to the accident.

Wherefore, defendant Southern Pacific Company, a corporation, prays for judgment herein, and for such other, further and different relief as, the premises considered, is reasonable and proper.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 29, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy-five thousand and no/100 dollars ($75,000.)

/s/ W. F. BRADLEY,
Foreman

[Endorsed]: Filed Feb. 4, 1955.

Southern Division of the United States District Court for the Northern District of California

No. 33393—Civil

MARY V. HEAVINGHAM, Special Administratrix of the Estate of ARTHUR V. HEAVINGHAM, Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on February 2, 1955, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Herbert Hepperle, Esq., and Robert Hepperle, Esq., appearing as attorneys for the plaintiff, and John Martin, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on February 2, 3, and 4, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy-five thousand and no/100 dollars, ($75,000.00), W. F. Bradley, Foreman," and the Court having

ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Seventy-five Thousand and No/100 dollars ($75,000.00), together with her costs herein expended taxed at $48.10.

Dated: February 7, 1955.

/s/ C. W. CALBREATH,
Clerk

[Endorsed]: Filed Feb. 7, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the plaintiff above named and to her attorneys:

You are hereby notified that on Friday, the 4th day of March, 1955, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it do fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Sherrill Halbert, a Judge of said Court, at the courtroom of said Court and Division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

1. For an order agreeably to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial, including the charge and instruction of the Court and the ruling of the Court on the instructions.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of the evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of law in instructing the jury, to

which objection and exception was duly made and taken, on *conscientious* pain and suffering, which required the jury to consider and permitted them to award damages for this element although there was no evidence to support such a finding.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 10, 1955.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

The matter of defendant's motion to vacate and set aside the verdict and judgment in the above entitled action and grant defendant a new trial therein came on regularly for hearing on April 22, 1955. Both parties appeared through their respective counsel, both parties submitted a written memorandum in support of their position relative to said motion, and both parties argued said motion. The motion was then submitted for decision. The Court having considered said motion and good cause appearing therefor:

It is hereby ordered, adjudged and decreed that defendant's motion to vacate and set aside the ver-

dict and judgment in the above entitled action and grant defendant a new trial therein be, and the same is hereby denied.

Dated: May 12, 1955.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above entitled action, deeming itself aggrieved by the judgment in the above entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of February 4, 1955, herein, and the judgment stamped filed on the 7th day of February, 1955, in the office of the Clerk of the above entitled District Court.

Dated: May 31, 1955.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and Appellant, Southern Pacific Company, a corporation

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Southern Pacific Company, a corporation, defendant in the above entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence including all exhibits received in evidence in the above entitled matter.

Without restricting the foregoing, there is hereby designated for inclusion in the record on appeal all of the matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including, but not restricted to, opening statements of counsel, evidence offered and received, instructions to the jury, defendant's objections and exceptions to the charge to the jury and all proceedings on motion for new trial including the order denying that motion, and all of the papers and proceedings to the end that there shall be included therein the complete record and all of the evidence and proceedings in the action.

Dated: May 31, 1955.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

[Endorsed]: Filed June 1, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the above-named United States District Court on the 7th day of February, 1955, in favor of Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Seventy-Five Thousand Dollars ($75,000) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, therefore, Indemnity Insurance Company of North America, a corporation duly incorporated under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of One Hundred Thousand Dollars ($100,000), being in excess of the whole amount of

the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, and without notice to said Indemnity Insurance Company of North America, a corporation, in her favor against the undersigned surety for such amount, together with interest that may be due thereon and the damages and costs which may be awarded against said appellant upon such appeal.

In witness whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly au-

thorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 31st day of May, 1955.

[Seal] Indemnity Insurance Company of North America
/s/ By GEORGE F. HAGG,
Its Attorney-in-Fact.

Approved: June 3, 1955.
/s/ O. D. HAMLIN,
United States District Judge.

Duly Verified.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for damages.
Answer.
Verdict.
Judgment on verdict.
Notice of motion for new trial.

Order denying defendant's motion for new trial.
Notice of appeal.
Designation of record.
Supersedeas bond.
Three volumes of Reporter's transcript.
Plaintiff's exhibits Nos. 13, 16, 25 and 26.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of July, 1955.

[Seal C. W. CALBREATH,
Clerk.
/s/ By WM. C. ROBB,
Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto that "Defense Instruction No. 9," hereinafter set out verbatim, was duly and timely requested by the defendant herein for submission to the jury in the trial of the above-entitled cause, and that said requested instruction be made part of the record herein and be certified as part of such record and transmitted to the United States Court of Appeals for the Ninth Circuit pursuant to the defendant's "Designation of Record" filed herein on June 1, 1955. The exact wording of said requested instruction is as follows:

"Defense Instruction No. 9.

"I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent.

San Francisco, California

July 18, 1955.

/s/ HEPPERLE & HEPPERLE,
/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
Attorneys for Plaintiff.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant
Southern Pacific Company.

[Endorsed]: Filed July 20, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, *do hereby* that the foregoing document, listed below, is the original filed in the above-entitled case, and that it constitutes a part of the record on appeal herein:

Stipulation containing Defense Instruction No. 9.

In witness whereof I have hereunto set my hand

and affixed the seal of said District Court this 21st day of July, 1955.

[Seal] C. W. CALBREATH,
Clerk.
/s/ By WM. C. ROBB,
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before: Hon. Sherrill Halbert, Judge.

Appearances: For Plaintiff: Robert R. Hepperle, Esq., and Herbert O. Hepperle, Esq. For the Defendant: Dunne, Dunne and Phelps, by: John W. Martin, Esq. [1*]

Wednesday, Feb. 2, 1955

(Whereupon a Jury was duly impaneled and sworn.)

Mr. Hepperle: Ready for the plaintiff.

Mr. Martin: Ready for the defendant.

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The Court: You may proceed.

Mr. Hepperle, Sr.: Plaintiff will call Fireman Maasen. Will you come forward, please, Mr. Maasen?

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

GEORGE E. MAASEN

called as a witness in behalf of the Plaintiff, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and Jury.

The Witness: George E. Maasen.

Direct Examination

Mr. Herbert Hepperle: Q. Will you restate your name, please? A. George E. Maasen.

Q. And how do you spell that last name?

A. M-a-a-s-e-n.

Q. Where do you live, Mr. Maasen?

A. 211 Joan Avenue, Concord, California.

Q. And how do you spell Joan?

A. J-o-a-n.

Q. What is you phone number there?

A. MUlberry 5-8966.

Q. Are you employed by the Southern Pacific Company? A. I am. [14]

Q. How long have you been employed by that concern? A. About thirteen years.

Q. In what capacity are you employed by them?

A. A fireman.

Q. When did you become a fireman, at the beginning or at a later stage of your first employment? A. At the beginning.

Q. Have you promoted to the job of engineer?

A. Yes, sir.

Q. Can you give us that date, or approximately?

A. September, 1951.

(Testimony of George E. Maasen.)

Q. Were you the fireman of any locomotive drawing a freight train on February 24, 1954?

A. Yes, sir.

Q. Is there a name for that train? What was it, an extra or what? A. It was an extra.

Q. And was it a freight or passenger train?

A. A freight train.

Q. You recall about how many cars you had hold of? A. I think it was twenty-nine.

Q. And what manner or style of engine did you have?

A. What they call a Mallet, a cab-ahead engine.

Q. Where did you start your run?

A. Suisun, California. [15]

Q. And was there an accident later after leaving Suisun? Did one take place? A. Yes, sir.

Q. And near or at what station? A. Davis.

Q. That's also in California?

A. That's in California.

Mr. Hepperle: Mr. Clerk, will you please mark these for the plaintiff as Plaintiff's Exhibits in order for identification?

May I, while he is doing that, Your Honor, continue the examination?

The Court: Yes, you may.

Let those photographs be marked Plaintiff's Exhibits Nos. 1 through 12 for identification in the order handed to the Clerk.

(Whereupon photographs referred to above were marked Plaintiff's Exhibits Nos. 1 through 12 for Identification.)

(Testimony of George E. Maasen.)

Mr. Hepperle: Q. Who was your engineer on this night? A. Joe Cooper.

Q. And if you recall, about when did this accident take place? A. About 2:30 a.m.

Q. When you speak of a cab-ahead engine, will you tell us [16] a little about it as compared with the usual locomotive?

A. Well, the cab is pulled to the rear of the engine. In other words, the engine is backing up at all times while proceeding ahead; that is, in respect to the mechanical condition of it, and the cab is built right out in front.

Q. I show you Plaintiff's Exhibit No. 2 for Identification and ask you if you recognize that?

A. Yes, sir.

Q. State whether or not that is a picture or photograph of the locomotive you were in and operating that night. A. Yes, sir.

Mr. Hepperle: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Martin: May I see it, Counsel?

(Counsel handing Mr. Martin Exhibit No. 2.)

Mr. Martin: Your Honor please, under the issues in this case I fail to see the relevance of photographs here. We have admitted that Mr. Heavingham was in the cab of the engine; there is no issue as to speed or force of impact or anything of that nature.

The Clerk: May I have the exhibit?

The Court: What is your theory of the admissi-

(Testimony of George E. Maasen.)

bility, Mr. Hepperle? I am in a little quandry, myself.

Mr. Hepperle: On two grounds, Your Honor. The first, in respect of the claims of contributory negligence raised [17] by the answer to which reference has been made.

The Court: We are not to that at this stage of the proceedings. I think we all recognize the burden is upon the defendant to establish that. If he doesn't offer any evidence on it, why, he can't stand on that, so we can't anticipate that defense, alleged defense at this time.

Mr. Hepperle: Secondly, upon the ground of conscious pain and suffering. Where was this man; what were the circumstances; what took place? And then wholly aside from that is the additional ground and reason that for the sake of illustration of rendering intelligible the testimony and bringing out exactly what the condition was, what happened and what confronted Mr. Heavingham in all aspects in which his presence in that cab is involved in this lawsuit.

The Court: For the moment I am going to sustain the objection, without prejudice. In other words, I don't mean by that that I am not going to admit this photograph, but at this stage of the case I will leave it for identification only. I may say right now there may be certain photographs I will admit and certain photographs I won't, or I may admit them all, or I may admit none, but I do not want to admit this photograph at this time.

(Testimony of George E. Maasen.)

Mr. Hepperle: May I have Your Honor's consideration, then, of these others, or shall I offer them separately?

The Court: Well, if you would like me to—I will [18] look at them and if there is some that I think you may proceed on, why, I will. I can't anticipate what objection—perhaps there won't be any objection, but I will take a look at them.

Mr. Hepperle: While Your Honor is examining those, may I hand the Clerk an additional group to be marked?

The Court: Yes, you may do so. They may be marked in numerical order, starting in sequence after these——

The Clerk: Eight, Your Honor.

The Court: All right, let them be marked.

The Clerk: The eight, 13 through 20.

(Whereupon eight photographs referred to above were marked as Plaintiff's Exhibits Nos. 13 through 20 for Identification.)

Mr. Hepperle: Shall I continue, or would it be more expeditious to wait your glancing at the others, too.

The Court: I think perhaps I will look at the others, too.

Mr. Hepperle: Thank you.

The Court: At this juncture of the case—I mean the photographs may be marked for identification, but I do not see that they have any probative value at this juncture. However, that is without prejudice.

(Testimony of George E. Maasen.)

Mr. Hepperle: Yes, sir.

Mr. Hepperle: Q. What is the seating arrangement in [19] this type mallet, and in particular the mallet engine that you had that night?

A. Well, there is an engineer's seat box on the right hand side.

Q. Describe it a little, will you, please?

A. Well, it is a metal box with a cushion seat on it where you carry—inside the box you carry your grip and jacket, and it's right next to an open window.

Q. And was that engineer's window, to your knowledge or not, open on this night and at the time of the accident? A. It was open.

Q. Is there a fireman's seat?

A. On the opposite side of the engine.

Q. Is it similar except that it is on the opposite side to the engineer's seat box? A. That's right.

Q. Now, is there a third seat?

A. There is a third seat in the—at the front of the engine, front of the cab, I should say, just a little bit to the left of the center of the cab.

Q. And what, if anything, is in front of it?

A. The—a window.

Q. Is that a window, an open window or a closed window? A. It is a closed window.

Q. Now, as your train was proceeding, were you working as fireman? [20] A. Yes, sir.

Q. And was the engineer operating the engine?

A. Yes, sir.

Q. Where was he seated and as you approached

(Testimony of George E. Maasen.)

the station of Davis, did you observe what he was doing, what the engineer was doing?

A. Yes, he was slowing the engine down.

Q. And what, if anything, did you observe him do with respect to a lookout; was he looking out of the window on ahead or what?

A. Oh, I see, yes, he was looking out of the window ahead.

Q. To explain myself, I am sure Counsel and His Honor will permit me to say that these have to go into the record, and so far as we are advised, the Jury are not railroad or train people, and so if you can tell us simply, but as clearly, how these things are.

A. Well, there is an arm rest on this window, and you usually lay on that arm rest and look out the side of the window.

Q. Is the cab so built that when in that position and so leaning one can see ahead? A. Oh, yes.

Q. What about the fireman's seat and window, is that similar? A. Similar, yes.

Q. As this train was approaching Davis, what, if anything, were you doing? [21]

A. I was looking out for signals.

Q. Where was Mr. Heavingham?

A. He was sitting in the fireman's seat box.

Q. In what seat box?

A. I mean—I beg your pardon, the brakeman's seat box.

Q. Now, just to speak of that a minute, do they

(Testimony of George E. Maasen.)

call it any particular brakeman's seat box, head brakeman, for instance?

A. Yes, head brakeman's seat box.

Q. I want you to explain the term—it will probably come up here—what does head brakeman mean?

A. The head brakeman is the brakeman that works the head end of the train and rides on the engine.

Q. And is there also just in counterdistinction a rear brakeman? A. Yes, sir.

Q. And so labeled and named because he is at the rear of the train and his duties are at that end? A. That's right.

Q. Now, as your train, so being operated, approached the station of Davis, tell us in your own words what you observed with respect to signals, if any.

A. We observed a yellow signal, which is—precedes a red one, and as we got opposite the water tank, there is a water tank in Davis, there is another signal which is—which was green. [22]

Q. Now, before you continue, when you came upon or it became visible to you, this first yellow signal, what, if anything, did you do in respect of it?

A. Why, I called the signal out; Mr. Heavingham called it out; and the engineer called it out.

Q. When you observed the next one, what if anything did you do?

A. We three called them out.

(Testimony of George E. Maasen.)

Q. Will you continue, then?

A. To one another.

Q. You are now, I believe, at the water tank.

A. Yes, the fog had lifted momentarily at that point.

Q. Let me stop you there, because it is my fault, I didn't ask you, but describe whether this was light or dark. A. It was dark.

Q. And what hour?

A. Oh, I should judge that would be around, I would say around 2:25, in my judgment.

Q. And what were the weather or visibility conditions, tell us about that?

A. The weather was very foggy and visibility was at that point, I should judge, about eight cars, eight car-lengths, which would be around—50-foot car-lengths.

Q. Did the visibility vary from time to time?

A. Yes.

Q. Now, will you tell us where—where you left off you had gotten, I believe, to the water tank. You found a certain signal, you called it out, as did the others, and then proceed from that point.

A. The next signal there is on a signal bridge and it was [23] yellow, and the fog settled down very heavy there, and we were, we all called the signal out to one another; and we continued looking for a red signal expecting the next one to be red.

And, as I say, the fog settled down and visibility, I would say, would be around two to three car lengths. And Mr. Cooper, the engineer, was going

(Testimony of George E. Maasen.)

at a reduced rate of speed; he had slowed down. And just before we arrived at the red signal, he had shut the throttle off altogether and was applying the engine brakes. That is just the brakes on the engine, not on the train, and slowing the train down.

Well, when we arrived at the red signal, it just came right out of the fog all of a sudden, and we all called it immediately, Mr. Heavingham and myself, and the engineer, he didn't—he saw it at the same time we did, and he put the train in emergency, that is, applied the emergency brakes.

Q. Tell us at this juncture, if you will, something in simple form about emergency brakes and how they are applied and what they are in respect to braking power.

A. Well, there is an emergency brake handle—I should say it's a brake valve handle, and you can apply the brakes with that, or put it all the way over in emergency. That's just throwing it all the way over. And that's, put the whole train in emergency, applies the brakes on every car and the engine, and that is the fastest way you can stop one.

Q. Tell us what happened.

A. Well, just about the time we saw that signal, or just a short while, two or three seconds, probably, after we saw the signal, I saw the markers on the caboose, that is, a red light on each side of the caboose. And of course the train was in emergency, there was nothing else to do to stop it.

Mr. Heavingham, as soon as he saw the markers

(Testimony of George E. Maasen.)

which was, I should judge, about two car lengths away, got up from his seat box and walked over to the engineer's side. I thought he was going to open the door and jump out—it flashed through my mind that is what he was going to do.

So I watched the coupling of the caboose for just about a second, getting closer, and then I got up on my seat box. Mr. Heavingham had come back to my side and stood right in front of me, almost on my feet, and I got up on the seat box to shut the oil valve off at the tank. There is an emergency oil valve cord in the cab of the engine on the fireman's side for just such an occasion, or a brake-into or the engine turning over, that pulling that emergency cord will shut off the oil valve at the tank which would put out the fire in the engine.

I thought of fire immediately, and I got up on my seat box to reach for that, and at that time, why, we hit the caboose. [25]

I was facing the—in other words, the back of the engine, my back, was toward the front of the engine reaching for this when it hit, and a steam pipe broke right in front of my face and burned my face quite badly, my eyes and the side of my ears and neck, and at that something else broke loose in there and hit me just a little below the chest and knocked me out the window.

Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About

(Testimony of George E. Maasen.)
that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks.

I looked back to see what had happened, and I still saw the fire flickering in the firebox, so I went back over to the tank, back over to the engine, and got on top of the tank and shut the oil valve off which put out the fire in the firebox.

Then I walked up the running board to the cab window on my side to try to get in there, and the steam was so hot I couldn't get near it. And I went back to what they call a monkey deck, I never heard it called anything else. It is a deck between the engine and the tank, and there's a ladder getting up to that—on each side. [26]

I went back to the monkey deck, crawled up the ladder and went up the engineer's side, crawled up his ladder as far as the window, and the steam was so hot there I couldn't get near it. And I got back down and I saw somebody down there and he asked me something; he said something to me. I don't know what it was. I told him to give me a hand; I have got a fireman—a brakeman and an engineer in there in that cab, help me get them out.

He said, "Well, I am the engineer." Of course, I had never seen the man with his hat and glasses off, and it was dark, too, so I a good close look at him and I said, "I am sure you got out, Joe." So I said —he asked me is the brakeman in there. "I guess he is in there, I don't know, I haven't seen him."

(Testimony of George E. Maasen.)

So I went around my side again and tried to get in the ventilator, which is just above the cab, and the steam there was boiling out. Then I thought of the blow-down valve which releases the steam from the boiler. So I walked along the top of the engine at the other end and I opened that and I got back down on the ground. And that is all I could do.

I couldn't—I tried to get in the cab on each side again and I couldn't get in, couldn't get up in front of the window.

So by that time I met the conductor and evidently he had [27] called the ambulance—I don't know who called him or when, but I heard the siren of the ambulance and you couldn't see the highway, it was so foggy.

So then the ambulance drivers came over and we started back to the ambulance. The ambulance drivers and the conductor helped the engineer and I over. And I happened to hear the steam quit blowing, so I told them, "I am going back and look in that cab."

The said, "No, come over to the ambulance."

I said, "No, I am going back and look in the cab." So I went back and got up on the running board on my side, walked up to the window again, and in the meantime, on my way back alongside the engine a brakeman handed me a fusee. Mr. Hepperle explained what the fusee is. That was the only light I had, so I lit that and looked in the window when I got up there and I saw Mr. Heavingham. I didn't know whether—I wasn't sure whether he was

(Testimony of George E. Maasen.)

dead or not, but I got down, I went back to the engineer and I said, "Well, Art's gone." That was Mr. Heavingham's name, that is what we called him.

He said, "What do you mean? Did he—isn't he in there?"

I said, "Yes." I said, "That isn't what I mean." I said, "Art's dead."

So we went back to the ambulance and I stood in the open door leaning against the front seat and told the conductor to [28] take his light and show the ambulance driver how to get up to the cab. He didn't know the ladder was gone on my side. So I told him he would have to walk up the running board and take the ambulance driver and show them how to get up there and take a look at Art, I said, and make sure before we leave. So he did. And he came back, one of the ambulance drivers—I asked him, "How did you find him?"

He said, "He never knew what hit him."

And they put me on the stretcher, put me in the ambulance and went to Sacramento.

Q. When you went back with the fusee and for the first time after the accident again observed Mr. Heavingham, where was he? Describe his position, and so forth.

A. Well, he was laying on his back and I think he was laying on his seatbox on his back. Only saw him from his waist up. And his face was turned more or less to the left, which would be toward the front of the engine. And he was very white.

(Testimony of George E. Maasen.)

Q. Now, I didn't want to interrupt your narration, but you used the term tank. Will you describe to us what a tank on a locomotive is?

A. A tender of the engine that carries the oil supply and water supply for the engine.

Q. And how does the oil get from the tank to the locomotive?

A. Well, in this particular engine it's—the tank is so far back from the fire box it is delivered by an air pressure in [29] the tank to force the oil to the firebox.

Q. You speak of shutoff valves. How many were there in relation to the equipment for shutting off the oil and where were they located?

A. Well, there was two, one in the engine.

Q. And was that the one you first referred to which you tried to reach? A. No.

Q. Keep going and tell me.

A. No, I wanted to shut off the tank valve, shut off the oil supply completely at the tank.

Q. But when you were in the engine and said you got up on the seatbox, what did you reach for to shut what off?

A. I reached for what they call the emergency shutoff valve, oil shutoff valve.

Q. That would be one valve that is inside the cab, would it?

A. No, that is on the tank. The cord runs from the engine back to the valve at the tank.

Q. And what position did you have to take in

(Testimony of George E. Maasen.)

order to reach that valve; in attempting to reach it, what position did you take?

A. I stood up on my seatbox to reach up to the top. It is up near the top.

Q. If I understood right, you didn't get it out?

A. No. [30]

Q. Didn't get it shut off?

A. No, I just turned around and put my hand up there.

Q. Now, I appreciate to you this is obvious, but tell it to me, if you can briefly. The fire was burning where? A. The firebox.

Q. And describe a little bit how this fire produces steam, by what means roughly, by what method.

A. Why, by oil, and the heat goes through flues which are pipes towards the opposite end of the firebox, and that heats the water to produce the steam.

Q. And the water you have already indicated, like the oil, comes from the tank?

A. That's right.

Q. Now, about how high was the top of this tank from the ground? Roughly, what is that distance, if you can give me an estimate?

A. I would say roughly from 12 to 14 feet.

Q. And what distance would you say it would be from the gangway or walkway in the back of the engine on the engineer's side to the rail or right-of-way? What distance would one—Put it this wise—getting into the cab or starting from the ground, assuming it to be level, how high would

(Testimony of George E. Maasen.)

he have to go to get into the cab to take his position?

A. Well, I would say between eight and nine feet.

Q. And how is the equipment formed or made for that purpose? What is it? [31]

A. A ladder, iron ladder, and grabirons; that is, two handles on each side.

Q. Grabirons are also used as a term, are they not, in relation to ladders alongside of boxcars and the like? I am just distinguishing for the record. When a brakeman climbs the side of the car what does he climb on?

A. I guess they are ladders, yes.

Q. And they are also referred to as grabirons, are they not? A. (No answer.)

Mr. Hepperle: It is immaterial, here, at least.

Q. Now, can you give us something of an estimate as to how long this all took before the ambulance arrived?

A. It is pretty hard to estimate the time.

Q. But in the course of it you made all the movements that you tell about? A. Yes.

Q. What was the effect, if any, of leaving of the fire having necessarily been left on after the accident; what would happen with that fire in there?

Mr. Martin: Well, I am going to object to that as indefinite. I don't know quite what counsel is driving at. I think the question is vague.

The Court: You understand the question, Mr. Maasen?

(Testimony of George E. Maasen.)

The Witness: Yes, sir. [32]

The Court: All right, you may answer it, then.

The Witness: A. The fire could very easily have caught the engine on fire.

Mr. Hepperle: Q. State whether or not the continuing fire would also cause additional steam.

A. Yes.

Q. And keep the heat up in the engine?

A. Yes.

Mr. Hepperle: I am wondering, Your Honor——

The Court: Just about to say we are going to take the afternoon recess at this time.

Ladies and gentlemen of the jury, we will take a brief recess at this time. You will remember the admonition of the Court heretofore given.

(Short recess.) [33]

The Court: After each recess I am simply going to announce that all are present in the jury box unless it is made clear to me that such is not the fact.

It will be deemed that all the jurors are present and in their proper places?

Mr. Hepperle: Yes, Your Honor.

Mr. Martin: Yes, Your Honor.

Mr. Hepperle: Q. I show you a batch of photographs—Mr. Clerk, is the larger group 1 to 12 inclusive?

The Clerk: Yes, sir.

Mr. Hepperle: Presently marked Plaintiff's 1 to 12 inclusive for identification only.

(Testimony of George E. Maasen.)

Q. You have seen these before, but would you glance through them again? A. Yes, sir.

Q. Would you tell us whether or not they are photographs of the locomotive involved in this accident? Just answer the question.

A. Yes, sir.

Q. I next show you another group, plaintiff's Exhibit No. 13 to 20 inclusive, for identification, and ask you the same question. Are they pictures of the locomotive involved in this accident?

A. Yes, sir.

Q. State whether or not from the time that the red board was [34] called and the engine you applied to same in emergency the subsequent events happened rapidly or not? A. Yes, sir.

Q. With respect to your getting about, will you tell us why you used a term such as "walk." In relation to walking, tell us what you encountered or what you covered in a little more detailed way. For instance, you say you went up on the tank. We don't know, not being railroad men, how you go to get up on the tank. Describe what you had to do.

A. Climb up a ladder.

Q. And give us an idea how long a ladder.

A. Well, it—the tank, as I said before, is between 12 to 14 feet high and about halfway up I can reach the oil valve.

Q. Now, in relation to getting around the engine and getting down on the ground, there were a number of instances that—I won't cover now, but just pick up one and sort of tell us the route you had to

(Testimony of George E. Maasen.)

travel, what you had to cover to get to the ground.

Let me be more specific. You recall you testified to the occasion where you met the engineer?

A. Yes.

Q. He didn't have his glasses or hat on?

A. Yes, sir.

Q. Where was he at that time, which side of the locomotive, the engineer's side or——? [35]

A. On the engineer's side standing near the locomotive about—I imagine about halfway between the tank and the front of it, as close as I can judge.

Q. Now, on the occasion when you got the fusee from the trainman, where did you meet him?

A. Near the front of the locomotive.

Q. You next mentioned meeting the conductor and walking over somewhere. Where did you go with the conductor?

A. Over what they call the monkey deck.

Q. Did you go with the conductor to the ambulance at any time? A. Yes.

Q. Where did you meet him before you started together with him over to the ambulance?

A. Alongside the engine, I would say, in the vicinity of the monkey deck.

Q. Did you at any time run around the front of the engine or the rear of the engine in order to get from one side to the other? Just answer yes or no. A. No, sir.

Q. How did you have to go to get from one side to the other? A. Over the monkey deck.

Q. Is it a correct term to say, descriptive, as an

(Testimony of George E. Maasen.)

engineer and fireman, that you had to climb over to get over the top of it, around it, or how? [36]

A. Climb up to the monkey deck which is, I imagine, around five feet from the ground. Then walk across to the other side which is the same width as the engine.

Q. And where would you go over the top of the engine, around the front part, or how?

A. To get to the other side?

Q. Yes.

A. No, climb up on the monkey deck and walk across the deck and down on the other side.

Q. Well, see if I understand it. You had to climb up. You got to the monkey deck by using the monkey deck. When on it you crossed on to the other side, is that it? A. That's right.

Q. Down on that side. You got down on the occasions you have testified about?

A. That's right.

Q. You are here under subpoena, are you not, of the plaintiff? A. Yes.

Q. You testified after this accident at the ICC investigation, did you not? A. Yes, sir.

Q. Were you hospitalized for your own injuries?

A. Yes, sir.

Q. I neglected to ask you this question: Before the ambulance left, what was the condition of your appearance? [37] A. Well, my——

Q. Especially your face?

A. My face was terribly swollen and burned.

(Testimony of George E. Maasen.)

Q. Give us more description. How swollen was it with respect to recognizability, if you know?

A. Well, everybody I happened to see didn't recognize me.

Q. Did you know Heavingham, Arthur V. Heavingham, the deceased, before the night of this accident? A. Yes, sir.

Q. What was this run, was it a regular assigned run for you? A. Yes, sir.

Q. Had you worked with Heavingham on prior other occasions? Or had he worked in relation to any train, or around any train?

A. Only on this particular run.

Q. That's where you came to see him and know him as the head brakeman?

A. No, I—I had met him on a passenger train—they call it the Owl, going to Los Angeles, on three or four occasions when he was on duty, and I was riding as a passenger.

Q. State whether or not before this accident you observed Arthur V. Heavingham as to his health and physical appearance. Just say yes or no, please. A. Yes.

Q. I have to state this for the record, as it may be technical; so that I understand it, tell the Court and jury what [38] you observed in respect as to his apparent health and physical makeup.

A. It was good so far as I observed.

Q. You have railroaded, I believe you said, for some 13 years? A. Yes, sir.

Q. State whether or not you have often had

(Testimony of George E. Maasen.)

head brakemen ride in the engine cab on different runs? A. Yes, sir.

Q. Are you familiar with the work of head brakemen in such cabs and locations?

A. Yes, sir.

Q. Have you so been over the years?

A. Yes, sir.

Q. State whether or not Mr. Heavingham did everything he possibly could in the situation that he was then in.

Mr. Martin: Object as calling for a conclusion.

Mr. Hepperle: Withdraw it.

Q. State whether or not there was anything that Mr. Heavingham as a head brakeman failed to do before this accident took place.

Mr. Martin: Object to that, Your Honor, on the grounds that it is a question for the trier of the fact.

The Court: Objection sustained.

Mr. Hepperle: Q. State whether or not you observed Mr. [39] Heavingham while the engine was proceeding toward Davis prior to the time that it arrived there. A. Yes.

Q. Did you have your eyes glued on him or observe him from time to time?

A. Observed him from time to time.

Q. What did you observe in respect to his giving attention to signals?

A. Why, he was watching for the signals just as intently as I was.

(Testimony of George E. Maasen.)

Q. State whether or not he called the signals as soon as you did, as soon as you saw them.

A. Yes, sir.

Mr. Hepperle: At this time, if Your Honor please, the plaintiff formally offers in evidence the group of photographs, Nos. 1 to 12 inclusive, marked presently for identification only, and separately it likewise offers in evidence the further group of photographs Nos. 13 to 20 inclusive.

Mr. Martin: I will renew my objection in view of issues in this case.

The Court: Objection sustained at this time.

Mr. Hepperle: You may cross-examine.

Cross-Examination

Mr. Martin: Q. Mr. Maasen, after this collision had [40] occurred—let me withdraw that. Can you state if there was a block signal at or near the point where the accident happened?

A. Yes, sir.

Q. And what type of signal was that?

A. Semaphore signal.

Q. That signal is a signal with two semaphore arms, is that correct? A. That's right.

Q. And at night that signal also has lights connected to it, does it not? A. Yes, sir.

Q. And those lights are red, yellow and green, is that right, sir? A. Yes, sir.

Q. You have already referred to yellow signals that you passed prior to coming to this particular signal. Do you recall that? A. Yes, sir.

(Testimony of George E. Maasen.)

Q. And a yellow signal, I believe you said, means that the block ahead is occupied, is that correct?

A. No, sir, it means the signal ahead will be red.

Q. I understand.

A. The following block is then occupied.

Q. So we will understand it, the train is proceeding in a [41] direction, say, east. The various points along the right-of-way are these signals you have been talking about, are they not?

A. Yes, sir.

Q. And if a signal has a yellow aspect it means that the signal immediately ahead of it is red, the next signal beyond it? A. Yes.

Q. And when that is red it means that the block ahead of that signal is occupied, is that right?

A. Yes, sir.

Q. So when you see a yellow signal you know that the block ahead of you is not occupied, but the block ahead of the one ahead of you is occupied; is that right, sir?

A. No, sir. You expect the next signal to be red but it could be yellow. A train traveling ahead of you could keep going in one block ahead all the time, but that didn't happen in this instance.

Q. In other words, a train traveling ahead of you the same speed as you do but separated by more than a block, you will be running consequently through signals; is that right? A. Yes, sir.

Q. If that train stops in a block you will come to a yellow signal and then the next signal will be

(Testimony of George E. Maasen.)

red to indicate there is something in that block just ahead of it? [42]

And these blocks in the train that you were traveling in is an area—can you tell us approximately how far it is between signals?

A. No, I don't believe I could.

Q. Would it be in the order of four-fifths of a mile, if I may refresh your recollection?

A. I wouldn't want to say, because I wouldn't know.

Q. Yes. It is some considerable distance; let us put it that way, isn't that right, sir?

A. I believe that in those particular blocks I think they are a little shorter than the average.

Q. In the neighborhood of thousands of feet, is that not right, sir? A. Yes.

Q. Yes. And now the red block signal that you observed shortly before this accident happened, can you tell us where that was with relation—withdraw that.

——about how far that was from the standing caboose with which it collided?

A. In my estimation it was between two and three car-lengths.

Q. And that would be on the basis of a 50-foot car-length, is that right, sir? A. Yes, sir.

Q. And after this accident occurred, you have told us that you were thrown from the window on the fireman's side, is that correct, sir. [43]

A. Yes, sir.

(Testimony of George E. Maasen.)

Q. And where were you when you first gathered your senses after this happened?

A. I was across two more tracks and on the right-of-way.

Q. So we can understand this, in this area where this accident occurred, there is what is known as a double track? A. That is right.

Q. Eastbound and westbound track?

A. Yes, sir.

Q. You were proceeding on the eastbound track, is that right? A. That's right.

Q. And circling in the direction of motion which you were moving, the other set of tracks would be immediately to the left of the engine which you were occupying, is that right?

A. That's right, sir.

Q. So when you—your first awareness after this accident you were, did you say between or on the other side of the double track to your left?

A. No, I was on the other side, but there is a side track there, a siding also parallel to the westbound main line. I was across both of those.

Q. I see.

A. And I was crawling on my hands and knees.

Q. And what did you first do after that? [44]

A. First thing I did was stand up and look around, and the first thing I saw was the fire flickering in the firebox.

Q. And at that time did I understand it you were alone, you observed no other people around?

A. That's right.

(Testimony of George E. Maasen.)

Q. Now, at some point other crew members from both your train and the standing train gathered around the scene, is that right, sir?

A. That's right.

Q. How long was it before any—the first person came to this area?

A. Well, I had put the fire out and I was down on the right hand side of the engine—the monkey deck, I should say. I had gotten down on the ground before I had seen anybody.

Q. I see. And that person that you observed at that time, was he a member of your train crew or a member of the standing train crew?

A. I couldn't tell you the first person I saw; I couldn't tell you a member of any crew or not.

Q. So at any rate you recognized him as a railroad worker, is that right, sir?

A. I hardly recognized him, somebody just passed me and that is all.

Q. All right. Any any rate, you got up from where you were on the ground, went over and put the fire out by climbing up [45] on the tank, as you told us, is that right?

A. That is right.

Q. And after you had done that someone came upon the scene, is that right, sir? Is that a fair statement? A. Yes.

Q. And I suppose after that other members—withdraw that. Members of both train crews arrived at the scene after that, is that correct, sir?

A. That's right.

(Testimony of George E. Maasen.)

Q. Now, when you came upon this red signal I believe you said that the engineer put the brake in emergency at just about the same time that you observed the signal, is that right?

A. He put it in emergency exactly at the same time.

Q. And at that time you called the signal red, is that right? A. That's right.

Q. And did Mr. Heavingham call the signal?

A. Mr. Heavingham called the signal.

Q. And what did he call it?

A. He called it yellow.

Q. And did you again call it red?

A. I did.

Q. Yes. Now, this business of calling signals, Mr. Maasen, is a job that is done by those members of the crew occupying the cab of the engine, is that right, sir? A. That is right. [46]

Q. And it is a cross check of the various people in the cab of that engine to make sure that they get these signals correct, is that right, sir?

A. That's right.

Q. I believe you testified in response to a question by Mr. Hepperle that you attended a joint hearing conducted by the Interstate Commerce Commission and the Public Utilities Commission of the State of California? A. Yes, sir.

Q. In reference to this accident.

A. Yes, sir.

Q. And on that occasion, sir, you were aware that the speed tape on this train showed it was

(Testimony of George E. Maasen.)

going 21 to 22 miles per hour at the time of impact?

A. Yes.

Mr. Hepperle: Just a moment. That is objected to as hearsay, no proper foundation laid. If you would like, I have the record, and he has it. It isn't the best evidence. Let us put the record in.

Mr. Martin: Whatever you say, I am willing to stipulate.

The Court: I can tell you right now we are not going to put any record in and sit here a couple of days while we read from the record. We have to stick to the issues.

Mr. Hepperle: I might say, Your Honor, I have no intention of reading it. It is a paper that relates to the accident. [47]

Mr. Martin: Referring to the tape itself, counsel? I mean, are you willing to stipulate——

Mr. Hepperle: Leave it, go ahead.

Mr. Martin: Q. Well, let me get at it this way, Mr. Maasen. What is your estimate of the speed of the locomotive at about the time of the impact?

A. I estimate between 12 and 15 miles an hour.

Q. I see. You are aware that the locomotive did carry a speed tape, are you? A. Yes.

Q. And that is a device which registers the speed of the locomotive at all points during its run?

A. That's right.

Q. It is a tape on which an inked record is kept for use by the operating department of the railroad after each run, is that right, sir? A. Yes.

Q. Now, let me ask you this, Mr. Maasen: at any

(Testimony of George E. Maasen.)

time before this accident occurred, did either you or Mr. Heavingham make any comment or statement to the engineer that his speed was too fast under the existing circumstances?

A. No, sir.

Q. And as I understand your testimony, the visibility was quite limited, not only by darkness, but by fog, is that right, sir. [48]

A. Yes, sir.

Q. And shortly before this accident occurred I believe you testified that you all had been looking for the red signal which was the one at or near the point of this accident, is that right?

A. Yes, sir.

Q. In other words, you knew that there was a signal in the general area, is that right, sir?

A. That's right.

Q. And I suppose that knowledge is based upon your familiarity with this terrain, this area that you rode over before, is that right?

A. That's right.

Q. And you mentioned that you have in the past had considerable experience observing the head brakeman about his work, is that right, sir?

A. Yes, sir.

Q. And will you tell me generally what a head brakeman does with reference to his job about a train?

A. You mean in and about the engine?

Q. Not in and about the engine, but generally in

(Testimony of George E. Maasen.)

connection with freight movements, such as was going on here.

A. Well, he has the duty to see the brakes are not sticking, see that the air hoses are coupled up, see that the air is in—none of the air valves are shut off, see that the air [49] is through all the cars on the head part of the train.

Q. And did any part of the duties entail the climbing of these cars? A. Yes, sir.

Q. And how is that done, is that by ladder?

A. Yes, I guess you would call it a ladder up the side of a boxcar.

Q. I see. In other words, there are these metal handholds that go up the side of the boxcar, is that right? A. That's right.

Q. And I presume his duties also included on occasion setting brakes of boxcars?

A. Yes, sir.

Q. Which are those brakes on platforms located 12 or 15 feet above the track, is that right?

A. That's right.

Q. And this particular run that you were doing I believe is known as the Suisun turn, is that right?

A. Suisun-Roseville turn, yes.

Q. Suisun-Roseville turn. And if I understand it correctly, that means your point of departure is Roseville, you go to Suisun, turn around and go back to Roseville, is that right?

A. Pick up another train and go back to Roseville.

(Testimony of George E. Maasen.)

Q. You indicated that was his regular job, is that right? A. Yes, sir. [50]

Q. How long had you been working it, Mr. Maasen?

A. I believe that was my seventh day on it.

Q. I see. And had Mr. Heavingham been on that job during those seven days that you worked it?

A. He was acting as the head brakeman; I think that was his first trip. He had been acting conductor the week before.

Q. Oh, on the same run?

A. On the same run.

Q. This is a run that occurred how many days a week? A. Six.

Q. And what was your departure time from Roseville, approximately?

A. Approximately—I believe it was 7:30.

Q. P.M.?

A. P.M. I believe that was the time, I'm not sure.

Q. Then you would go down to Suisun, pick up another train and go back to Roseville, arriving back in Roseville about when?

A. Anywheres from seven, eight, nine o'clock in the morning.

Q. I see. A. The following morning.

Q. Out again at 7:30 and repeat the process six days a week, is that right?

A. That's right.

Q. I believe you stated in response to a question

(Testimony of George E. Maasen.)

by Mr. [51] Hepperle that you received burns yourself in this accident, is that right?

A. Yes, sir.

Q. There was some little time elapsed before you were aware of that, was there not?

A. Well, there was some time lapsed before I was aware my legs was burned. I knew my face was burned.

Q. You also burned your legs?

A. Yes, sir.

Q. Well, when did you discover they had been burned?

A. Oh, about the first time I stood still for a couple of moments. [52]

Q. I see. Was that before or after you climbed up on the locomotive for the first time?

A. It was after.

Q. After you had climbed up and turned off the valve, is that correct, sir?

A. Which valve was that, the oil valve?

Q. Yes, sir. A. Yes, sir.

Q. You said, I believe, in response to one of Mr. Hepperle's questions, Mr. Maasen, that you had met Mr. Heavingham before on the Owl, a passenger train, is that right? A. Yes, sir.

A. And was that as a fellow passenger or was he working on the train?

A. No, he was working.

Q. I see. Well, about when was that, if you recall?

(Testimony of George E. Maasen.)

A. Oh, that has been several years ago. I couldn't tell you just how long ago.

Q. Now, during the time that you were at or about the locomotive following this accident, Mr. Maasen, you at no time heard any outcry from the cab of the locomotive, is that correct?

A. No, sir.

Q. Or any sound of a human voice of any kind?

A. No, sir. [53]

Q. Is that correct, sir?

Mr. Martin: I believe that is all I have, Your Honor.

Mr. Hepperle: I have a few questions further, if I may, Your Honor.

The Court: You may.

Redirect Examination

Mr. Hepperle: Q. Are you still suffering from the injuries you sustained in this accident?

Mr. Martin: I will object to that as immaterial, Your Honor.

The Court: The objection will be sustained.

Mr. Hepperle: Q. Can you give us an estimate of the length of this engine and the tender or water tank?

A. Well, I would judge around about 125 feet.

Q. We have spoken of the engine striking a caboose even though the engineer had applied the brakes in emergency. What caboose was this? On another train ahead or what?

A. Another train ahead.

(Testimony of George E. Maasen.)

Q. And tell us briefly what is a caboose? Describe it.

A. Well, a caboose is more or less the office for the conductor.

Q. Describe it as to size, weight, compared with a boxcar, for instance.

A. Well, it is considerable lighter than a boxcar and [54] somewhat shorter.

Q. And where does it normally appear in the train on a run?

A. On the rear of the train.

Q. And was this caboose the caboose at the rear of a train ahead? A. Yes, sir.

Q. Is a head brakeman permitted to run the engine? A. No, sir.

Q. Is he permitted to take away the controls from the engineer? A. No, sir.

Q. Who, under the book of rules and the operating rules of the Southern Pacific Company, is in charge of that engine?

A. The engineer.

Mr. Martin: Your Honor, I think the rules will be the best evidence of that.

The Court: Be sustained.

Mr. Hepperle: Q. Have you, in your thirteen years of experience, ever encountered a situation where the engineer yielded his engine to the head brakeman and permitted him to take it over?

A. No, sir.

Mr. Martin: Your Honor, I will object to that as immaterial, and move the answer go out. [55]

(Testimony of George E. Maasen.)

The Court: The objection will be sustained and the answer may go out.

Mr. Hepperle: In respect to these pictures, Your Honor, may I ask whether Counsel has any objection going to the sufficiency of the foundation laid, or are you willing to stipulate that the foundation is laid. Your objection is on grounds that you so far have stated.

Mr. Martin: Well, as I understand the record, and I can't recall it in detail, Mr. Maasen has testified that this was the engine involved. I will stand on Mr. Maasen's testimony as to foundation, whatever it might be, Your Honor.

The Court: Let's get this cleared up. I think there is a deficiency there in that regard in that there is no testimony to show that these pictures here correctly portray the scene that they are supposed to portray.

Now, there isn't any use in hiding it, get it out in the open, but I haven't sustained the objection on that ground. I will have to, if that matter comes to issue. So I think you should have an opportunity to correct the situation, Mr. Hepperle, and I don't want to have a lot of fuss about pictures or something that can be corrected by calling a witness.

Mr. Martin: If Your Honor please, it has been indicated by Mr. Hepperle that Mr. Maasen has seen these pictures previously and has seen them now. I think the matter could [56] be taken care of by a single question to Mr. Maasen, a general ques-

(Testimony of George E. Maasen.)
tion directed to all the pictures to clear up that deficiency.

The Court: Let's get it out of the way now. A lawsuit shouldn't be won or lost because of technicalities, and it is my opinion that that has not been covered at the present time.

Mr. Hepperle: That is the only reason I asked the question, Your Honor, and in the interests of time, and I appreciate the burden Your Honor has, I merely wanted, in a very simple way, to ask him did he have any objection. If he does, I can bring any number of witnesses.

The Court: Why not just ask Mr. Maasen here, now, if he has looked at all the pictures right here in the courtroom and ask him if those pictures in his opinion correctly portray the scene as he saw it there at the time, or after, or what he sees there; does that correctly portray the scene. I don't know, I can't speak for Mr. Martin, but I will suppose that if he so testified that would be——

Mr. Martin: That would be the end.

The Court: End of that matter.

Mr. Hepperle: May I endeavor to frame the question in the light of Your Honor's suggestion?

The Court: You certainly may. I don't want to bring any witness back here if it can be avoided at this time. [57]

Mr. Hepperle: Q. Mr. Maasen, state whether it is a fact that the pictures now numbered and labeled One to Twelve, inclusive, and Thirteen to Twenty, inclusively, correctly portray what appears

(Testimony of George E. Maasen.)

upon their face and of the right-of-way and of the things shown thereon of the locomotive, area and additional equipment involved in your train and its removal?

A. Generally it is covered as well as I can tell you.

The Court: Well, Mr. Maasen, the only question is: do you see any picture there which is, putting it in plain language, that looked like a phony to you?

The Witness: No, I didn't.

The Court: In other words, what you can see in those pictures there as you remember it is a correct portrayal of what you saw there at the time of the accident?

The Witness: Well, there is a lot in those pictures I didn't see.

The Court: I understand that, but everything you saw there, it is correctly portrayed in these pictures there?

The Witness: Yes.

The Court: Well, now, you say there is a lot in those pictures that you didn't see.

Mr. Martin, is there any question that that is going to enter into it?

Mr. Martin: No, Your Honor, I am willing to accept the [58] witness' statement, and I will not make any objection as to foundation.

The Court: That is behind us, then.

Something else, Mr. Hepperle?

Mr. Hepperle: That is all, Your Honor.

(Testimony of George E. Maasen.)

The Court: Mr. Martin, any recross?

Mr. Martin: Just one question, or two.

Recross Examination

Mr. Martin: Q. Mr. Maasen, when you state that you were down by these tracks immediately after the accident happened, were you ahead of the engine because of the fact you had been thrown out of the window?

A. No, sir, I was just about opposite the engine.

Q. I see, opposite the cab of the engine?

A. Yes.

Q. And in feet how far would you say that was from the cab?

A. Well, I wouldn't want to say. I don't know how much distance between the main line and the siding is. I couldn't even estimate that now.

Q. I see. Well, from your recollection could you state was it in the neighborhood of twenty feet, fifteen feet, twenty-five feet, anything like that?

A. Well, I would say around twenty, twenty-five feet. [59]

Q. Twenty-five feet. Then what did you do, walk up next to the engine and back to get up to the monkey deck? A. Yes, sir.

Q. In other words, you walked up to the cab and walked back and up and over the monkey deck and over, is that correct?

A. I took the flashing of the fire as a target, so-to-say, and walked immediately over there and down the side of the engine to the monkey deck.

(Testimony of George E. Maasen.)

Q. And the flashing of the fire was in the neighborhood of the cab, is that right, sir?

A. Yes, sir.

Mr. Martin: Thank you.

Mr. Hepperle: That is all, Mr. Maasen.

Examination by the Court

The Court: Q. Mr. Maasen, just to clear that up, I think I know the answer, but perhaps some of the jurors don't, and certainly it isn't in the record, the firebox on one of these mallet engines, whatever they call it, is in the front end of the engine as it goes forward, is that not right?

A. Yes, sir. It is just behind the cab.

Q. In other words, to get the matter in ordinary form, it is as though you took the engine itself and turned it around [60] with its face to the tender and the engineer's cab is down the track where you are going instead of back by the tender as it is on most engines? A. That's right.

Q. And one thing that I think may be helpful to us in the matter, and that is, how many drivers on this engine?

A. I believe there are sixteen.

Q. How many cylinders, let us put it that way.

A. Four cylinders.

Q. In other words, the average engine, or common engine, only have two cylinders?

A. That is right.

Q. And this has twice that many back under the boiler? A. That's right.

(Testimony of George E. Maasen.)

The Court: Now, in view of what I have asked, anyone else want to ask any other questions?

Mr. Hepperle: Thank you, Your Honor, for having gone into it.

Further Recross Examination

Mr. Martin: Q. Mr. Maasen, is the firebox accessible from the cab?

A. You mean to get to the firebox?

Q. Yes, sir.

A. Yes, sir, inside of the cab there is a fire door.

Q. I see, which opens right into the firebox?

A. Into the firebox.

Mr. Martin: Thank you, sir.

The Court: Anything else?

Mr. Hepperle: Just this, Your Honor. Technically, for the record, in the light of our present record, I make and renew my offer of the photographs One to Twelve and Thirteen to Twenty, each inclusive.

The Court: Well, I have heretofore indicated my ruling. I do not consider at this stage of the case that they have any probative value. I see no reason for modifying the ruling at this time. The objection—I assume you are letting your objection stand?

Mr. Martin: Yes.

The Court: Unless you want to withdraw it, but the objection will be sustained.

Mr. Hepperle: That is all, Mr. Maasen.

The Court: Either one of you want Mr. Maasen to remain?

(Testimony of George E. Maasen.)

Mr. Martin: Not I, Your Honor.

The Court: As far as the Court is concerned, why, you can leave or stay here at your pleasure, Mr. Maasen.

Mr. Hepperle: Thank you. I suggest you take a seat in the courtroom.

(Witness excused.)

The Court: It appears we have reached the usual hour [62] of adjournment. Is there any witness that will be discommoded, that is, any brief witness, that will be discommoded if they return tomorrow?

Mr. Hepperle: There is not, Your Honor.

The Court: All right, we will take the adjournment at this time, Ladies and Gentlemen.

Ladies and Gentlemen of the Jury, we will take an adjournment at this time until ten o'clock tomorrow morning, at which time you will return and we will resume the trial of this case. You will remember the admonition the Court has heretofore given you. You may be excused at this time.

Counsel, I would like you to remain so we can discuss the course of the case.

You may be excused, ladies and gentlemen of the Jury.

(Whereupon the Jury retired from the Courtroom.)

(Whereupon there was a discussion between Court and Counsel pertaining to the length of time of the present trial.)

(Whereupon an adjournment was taken in the above-entitled matter, until the hour of 10:00 o'clock a.m., Thursday, Feb. 3, 1955.)

The Clerk: Heavingham vs. Southern Pacific Company, for further trial.

Mr. Herbert Hepperle: Ready, Your Honor, for the plaintiff.

Mr. Martin: Ready for the defendant.

The Court: Proceed; the jurors are all present.

Mr. Hepperle: May I recall Mr. Maasen for a few questions, Your Honor?

Mr. Maasen, will you come forward, please?

GEORGE E. MAASEN

recalled to the witness stand, previously sworn.

The Court: The record may show this witness has previously been sworn.

Further Redirect Examination

Mr. Hepperle: Q. Mr. Maasen, I neglected to ask you specifically whether or not the fog and darkness continued throughout all of the things that you have narrated and until the time and at the time you left in the ambulance.

A. Yes, sir.

Q. State whether or not it was—what the condition was as to darkness and density of fog during that last period after the accident. [65]

A. Well, the fog was very dense and it was quite dark.

Q. Did your engine have a headlight operating before the accident? A. Yes, sir.

(Testimony of George E. Maasen.)

Q. State, if you know, what happened to it in the accident.

Mr. Martin: I will object to that as immaterial, Your Honor.

The Court: The objection will be sustained.

Mr. Hepperle: Q. Was there any light around that engine cab or in that area at all, any lights from any source? A. No, sir.

Q. At any time during the period that you have narrated after the accident and your activities in relation to it, were there any lights?

A. No.

Mr. Hepperle: May it be stipulated, Mr. Martin, that Rule 106 of the Southern Pacific Company's rules and regulations of the Transportation Department was in full force and effect prior to and at the time of the accident in question here and that such rule reads as follows—may I read it, Your Honor?

The Court: You may.

Mr. Hepperle: Rule 106:

"The conductor and the engineer and the pilot, if any, are responsible for the safety of the train and the observance of the rules, and, under conditions [66] not provided for by the rules, must take every precaution for protection.

"This does not relieve other employees of their responsibility under the rules."

Mr. Hepperle: Q. Mr. Maasen, you are and were familiar with this rule at and before the time of this accident? A. Yes, sir.

(Testimony of George E. Maasen.)

Q. Will you tell us what is a pilot?

A. A pilot is an engineer that pilots another train over a territory that the engineer is not familiar with this book of rules.

Mr. Hepperle: Mr. Martin, may it be further stipulated that Southern Pacific Company, Western Division, special instructions No. 5, effective Sunday, September 27, 1953 were in force and effect at the time of and prior to the accident in question, and particularly that portion thereof on page 10 reading as follows:

"All trains must run carefully during and after heavy storms, particularly when the track is apt to be affected. When fog, storms or other conditions obscure track or signals, speed of trains must be so reduced as to permit strict observance of signals and insure safety regardless of time."

Mr. Martin: So stipulated.

The Court: That is as to both matters? [67]

Mr. Martin: Yes, sir.

The Court: I don't think you answered to the other.

Mr. Hepperle: Thank you, Your Honor.

Q. In your testimony you referred to the fact the Mallet engine after the accident continued to work steam. Tell us how that operates and what sound, if any, is made, and describe the sound, if any.

A. Well, the only thing the steam operated at that time would be the air pumps, which provides air for the brakes throughout the train, and they

(Testimony of George E. Maasen.)

are quite loud, that is, the exhaust from them are quite loud when they are operating, and that is the only thing the steam would operate outside of the escaping steam.

Q. That I will speak of in a moment. Now, tell us about the escaping steam and what sound, if any, came from it.

A. Well, it was quite a noise, the steam escaping.

Q. How far away from the engine were you when you were over at the ambulance which had arrived? Give us a rough estimate of distance.

A. Oh, I should judge it would be around 150 feet.

Q. You testified, and you correct me if I am wrong, that while you were at this ambulance you heard the steam cease.

A. On the way to the ambulance.

Q. On the way to. And did you return then to the engine? A. I did. [68]

Q. And that was the occasion when you got the fusee later on, and so on? A. Yes.

Q. I will not go into it again.

Mr. Hepperle: You may cross-examine.

Recross Examination

Mr. Martin: Q. Mr. Maasen, one matter I forgot to ask you yesterday. What is the meaning of a yellow signal when observed?

A. Well, that is a caution signal to be prepared to stop before reaching the next home signal.

Q. And in this particular case the yellow signal immediately preceding the red signal in effect

(Testimony of George E. Maasen.)

meant be prepared to stop short of the red signal, is that right? A. That is right.

Q. And just one thing, it is a little hard to explain verbally. May I use the blackboard for a moment, Your Honor?

The Court: If it has any bearing upon the case, you may.

Mr. Martin: (At the blackboard) Just taking a track and here is a signal and here is a signal, and the train proceeding in this direction, a yellow signal here would mean that this signal is red, is that right?

A. It would be at that particular time, yes, it would be red.

Q. To a train here with a red signal here means this signal [69] is red (indicating)? And when the signal is red mean this signal is controlled by electrical circuits in the railroad track which would mean that the area between this signal and the next signal is in some way occupied, is that right?

A. That's right.

Q. One other thing. With reference to the duties of a switchman, Mr.—I mean a brakeman, Mr. Maasen, on the road, in addition to the matters we discussed the other day, he also has occasion to throw switches, is that correct? A. Yes, sir.

Q. That is the switches which stand by the tracks to control the movement of trains over those tracks, isn't that right, sir? A. That's right.

Mr. Martin: I think that is all I have, Your Honor.

(Testimony of George E. Maasen.)

Mr. Hepperle: That is all, but I would like him to remain in attendance, Your Honor.

The Court: Very well.

Mr. Hepperle: Plaintiff will call, with Your Honor's permission, Mr. Drisko.

ROBERT D. DRISKO,

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and jury.

The Witness: Robert D. Drisko, D-r-i-s-k-o.

Direct Examination

Mr. Hepperle: Q. What is your business or profession, Mr. Drisko?

A. I am an actuary.

Q. By whom are you employed?

A. The firm of Coates, Herfurth and England, consulting actuaries.

Q. And where do they maintain offices in this city, if they do?

A. We have an office at 620 Market Street.

Q. Will you tell us something of your training and background and qualifying for this work of being an actuary?

A. I have a Bachelor of Science degree in mathematics from Stanford University. I have taken two years' additional work in actuarial science at the University of Manitoba in Winnipeg,

(Testimony of Robert D. Drisko.)

Canada. I have had two years' work at Massachusetts Mutual Life Insurance Company at Springfield, Massachusetts, and I have been employed with the firm of Coates, Herfurth and England since July 1951.

Mr. Hepperle: Mr. Clerk, will you please mark these three papers as Plaintiff's Exhibits next in order for identification?

(Whereupon the documents referred to above were [71] marked Plaintiff's Exhibits Nos. 21, 22, and 23 respectively.)

Mr. Hepperle: Q. Did you, at the request of my office, Mr. Drisko, prepare Plaintiff's Exhibits 21, 22 and 23 for identification? A. I did.

Q. Will you tell us first what you did in relation to ascertaining the life expectancy for the several people at different ages shown on Exhibit 21, and what you learned?

A. I learned that the life expectancy of three people, a male aged 57 and the female aged 49 and the female aged 10, I found the values for those life expectancies in a book showing the particular expectancies of these years of age.

Q. And what did you find as to their respective life expectancies according to their age; will you tell that?

A. All right. Under the—according to the American Experience Mortality Table, the life expectancies are as follows: For a male aged 57, life expectancy is 16.05 years; for a female aged 49, life

(Testimony of Robert D. Drisko.)

expectancy is 21.63 years; for a female aged 10, life expectancy is 48.73 years.

Q. Did you also ascertain the life expectancies of these people according to another table?

A. I did.

Q. Will you tell us what you did in that regard and what you found? [72]

A. Using the United States Life Table, 1939 to 1941, for white males, a life expectancy of a male aged 57 is 16.98 years. Using the United States Life Table, 1939 to 1941, for white females, the life expectancy of a female aged 49 is 25.54 years; and that for a female aged 10 is 60.85 years.

Q. And tell us why in this instance you used the age 57?

A. The 57 is the nearest year of age of the individual.

Q. Will you turn now to Plaintiff's Exhibit 22 for identification. Did you ascertain the cost of a monthly life annuity, and if so, in what manner?

A. I have two tables. Can you be—let me know which one is which.

Q. Will you take the first one.

Mr. Hepperle: May I consult with the witness a moment, Your Honor?

The Court: You may.

Mr. Hepperle: This one first (indicating).

A. All right. May I have the question one more time, please?

Q. What, if anything, did you determine in re-

(Testimony of Robert D. Drisko.)

spect of the cost of a life annuity for a male aged 56?

A. For a male aged 56, based upon the Metropolitan Life Insurance Company published annuity rates, the cost for $10 per month for life is $2,148.18, and the cost——

Mr. Martin: Just a moment, please. Your Honor please, I have before me this document that the actuary is referring to, [73] and this next statement he is going to make I will object to upon the ground there is no foundation in this case for any such computation. I will show you the document that has been supplied me by counsel.

The Court: I do think it is premature at this time.

Mr. Hepperle: You wish us to hold the man here until we get to it? Otherwise, in order——

The Court: Can't you gentlemen agree upon that?

Mr. Martin: I would like to have an opportunity to discuss it with counsel, and, if necessary, with Your Honor.

The Court: The point is that it is something that you ought to be able to calculate with mathematical certainty, and I don't see any occasion for a long harangue here in court about the matter.

Now, one or both of you have the figures, you know what the issue is in the matter, and if there is any question about it I will let you put in both figures on the thing if it is necessary, if you think it is necessary, but you ought to be able to agree

(Testimony of Robert D. Drisko.)

on those two figures, and I think you know what I am talking about.

Mr. Martin: Yes, sir, I agree with that.

The Court: If you want to talk the matter over, if you can do it in a few minutes, all right; if not, we will take a brief recess and give you a chance.

Mr. Martin: Your Honor please, I would like to be heard [74] on this matter, either at the bench or——

The Court: No, I don't want to do any business at the bench. Let the jurors go outside and relax and we will discuss it then.

Ladies and gentlemen of the jury, I don't think I have said this to you, but in cases of this sort there are certain law problems that the Court alone has to determine, and they have nothing to do with the facts that you have to determine. I have frequently used the expression that it is difficult enough for you to segregate the wheat from the chaff, even if we cut the chaff down to a minimum, so I don't think I should call upon you as lay people to determine what is law and what is facts, so under the circumstances I am going to excuse you for a while to discuss this question of law so you won't be burdened with that problem.

I tell you this so you will know there are no secrets going on here behind your back. It is just a matter of procedure, and when we get down to the facts you will have all the facts, but as to the law, that is my burden, and no need for having the jury

(Testimony of Robert D. Drisko.)
try to worry along with something that is my burden.

I will excuse you at this time. You will remain in the immediate vicinity subject to call by the crier, and you will remember the admonition of the Court heretofore given. You may be excused at this time. [75]

(Whereupon the jury retired from the courtroom.)

The Court: The record may show the jurors are outside the courtroom and beyond the hearing of these proceedings.

Mr. Martin: If I may make myself clear on this——

The Court: I know what your point is, Mr. Martin; it comes back to this question of the income tax again.

Mr. Martin: That, and there is another question, too, Your Honor. I don't disagree with Mr. Hepperle's figure of $480 a month, which is one twelfth of his gross annual income for the year 1953, the calendar year immediately preceding his death. However, the measure of damages in this case is not the gross income of the decedent, it is the amount of contribution he could reasonably be expected to make to his family; that is, those dependent upon him: and certainly taking his gross income and capitalizing or buying an annuity to provide his family with his gross income for the rest of his natural life is not the measure of dam-

(Testimony of Robert D. Drisko.)

ages, and I may submit to you there is a case right on that point, Your Honor.

The Court: You don't need to give me any authority. I know what the law is and I don't think any court in the world would hold otherwise that the plaintiff is only entitled to recover the pecuniary value and the benefits that would have come to the surviving heirs of the deceased. It is not based upon what his income was; that is why we get this evidence in here about whether he was generous and loving and a devoted man [76] or whether he was miserly and mean and penurious man.

The first problem I want to cross, are you going to question the rule that the income tax is in or out here?

Mr. Martin: I am going to do that, depending upon the testimony, Your Honor. I intend to cross-examine Mrs. Heavingham upon the amount of contributions she has received in the past. Now, if the testimony is that she has received contributions which, according to my figures, are in excess of what I can show Mr. Heavingham took home each month, I think I am entitled to cross-examine her on that basis, because whether it is subject to income tax or not, the fact is, Your Honor, that past experience on what his contributions had been is some guide to what his contributions would be expected to be in the future.

The Court: Well, but then here, Mr. Martin, is the problem in this case. There is no question that Mrs. Heavingham and Kathleen didn't pay any in-

(Testimony of Robert D. Drisko.)

come tax on the money that was given to them by their husband and father.

Mr. Martin: That is correct.

The Court: And there isn't going to be any income tax on what this jury awards them, if any.

Mr. Martin: That is correct, Your Honor.

The Court: Well, as I see it, the question of income tax is out the window in this case, anyway you want to look at it.

Mr. Martin: Well, I think this: Isn't it—— [77]

The Court: Now, you're going on to the second point. If Mrs. Heavingham testifies that Mr. Heavingham gave her $600 a month to spend in her household—but that is presupposing something that may never occur.

Mr. Martin: That is correct.

The Court: Obviously, if Mrs. Heavingham suggests she received a lot more money than the records of the company indicate he received, you may cross-examine, pursue that matter to ascertain what other source, if any, he had of income, and if necessary you may show what his take-home pay was from the company. But as a mere showing that his income was X number of dollars less so many dollars, I don't think that is going to assist us any in this case, because as I say, Mrs. Heavingham didn't pay any income tax, nor Kathleen didn't pay any income tax on the money they received, or benefits that they received from the deceased husband and father, and they are not going to pay any income tax on this here now.

(Testimony of Robert D. Drisko.)

So what we are going to have to do is hew down the line, and then I will come to your second point which I think has merit, that the only issue in this case is how much benefit could Mrs. Heavingham and Kathleen reasonably expect to have received in dollars and cents. Now, isn't that the issue?

Mr. Martin: That is right, Your Honor, and I submit capitalizing his gross income is certainly——

The Court: I am going to agree with you on that; I think [78] you are absolutely right on it, and I don't think—I think the figure would tend to confuse the jury, and I think I am going to suggest, Mr. Hepperle, it be revamped in some fashion, or break it down. I don't know whether this—what is the $10 here, is that a unit you could use all the way up, or is it different?

The Witness: No, that is a unit.

The Court: So that actually, then, $460 per month is simply 46 times $2,148.18?

The Witness: Rounded to the nearest dollar.

The Court: Yes.

The Witness: Correct.

The Court: Well, isn't that the end of the line?

Mr. Martin: That is why I made my objection at the time I did.

The Court: I think it is entirely proper you should have. I want to get the air cleared from this particular situation. I want both sides to know what my position is going to be. Did you have something more, Mr. Hepperle?

Mr. Hepperle: I agree exactly with what Your

(Testimony of Robert D. Drisko.)

Honor has said. I want to make one suggestion, however, that as Your Honor has done it and will do it again and again in the future with your instructions to the jury, will take care of every item because we take no different position as to the law than Your Honor has so ably stated. The thing is that what our [79] people are entitled to on the earnings business is what you said, the contributions, I meant, but to have this before them and have Your Honor say it, and we both can argue it, it is only contributions and it is only upon that theory that I proffer this at all. I suggest it is better this way and better for the record if Your Honor handles it in the instructions, as I am sure you will. [79A]

The Court: Well, I propose, in my instructions, to point out the law as I understand it to be, and as I have indicated here that it is only the cash value of the contributions that Mrs. Heavingham will have received and Kathleen would have received up to the age of her majority or up to the time that she was married.

First I suggested the other day that I am not well. There is no need getting in that as it has no bearing upon this case here. But these things are all very nebulous in character and when you have to depend on the common sense and good judgment of those 12 ladies and gentlemen who are jurors here and trying to figure out as best they can what will correct the situation that is complained of here, and put it in dollars and cents,—which is ex-

(Testimony of Robert D. Drisko.)

tremely difficult but nevertheless that is the way our law courts operate—then we have to do it that way.

Mr. Hepperle: In that connection I think it will be clearer and better if the jury hears it all from Your Honor as to what the measure is.

The Court: All right. Then it's my intention too; I think you should stop at this unit of $10 per month because that gives you something to argue from.

Mr. Hepperle: Very good, Your Honor.

The Court: Then if you think that Mrs. Heavingham got $400 per month it is simply forty times that amount. If Mr. [80] Martin wants to argue that she only got $100 a month, it's an argument.

Mr. Hepperle: An excellent suggestion.

Mr. Martin: Well, of course, I don't agree, Your Honor, with the theory that the only basis for the jury is the cost of an annuity from the life insurance company.

The Court: Well, in other words, I am not going to hold you to that. You can argue anything you want on the thing from that standpoint. But so far as these figures here are concerned, personally, I think again that I disagree with this rule that has been laid down, but I am not the one who makes these laws. The people upstairs tell me what the law is. And they have stated that one of the bases for determining these matters is an annuity furnished by a reliable insurance company.

Mr. Martin: I understand that, Your Honor.

(Testimony of Robert D. Drisko.)

The Court: Well, I think it's an extremely unfortunate rule because I think it should be a representative group of insurance companies at the very least. In addition to that, I think it has its vice in that it provides for a profit and loss and that sort of thing, in a company that is operating—but that is not for me to say. When the Circuit Court speaks, that is the rule that I have to go by, and they have spoken in that regard, in my opinion.

So you can argue whatever you want to about the matter. [81] I am not going to stop you on that. But I am going to permit that evidence to come in because I think that is what the Circuit Court says is permissible.

Is there anything else you want to take up?

Mr. Martin: I can think of nothing further.

Mr. Hepperle: I think that catches it, Your Honor.

The Court: All right. Then you can call the jury in. I might say that it is my policy not to permit the documents in evidence. You may have the witness testify, but the documents will simply stand for identification, so that you have it in the record. As I believe the witness' testimony may not be reduced to writing, any witness, and this is no exception.

Mr. Hepperle: Thank you very much, Your Honor.

The Court: Well now, are we going to go into any of the figures here about income at this time or is that going to be abandoned for the time being?

(Testimony of Robert D. Drisko.)

Mr. Hepperle: I think the income business will be a matter of record from only their organization.

The Court: I just wanted to know if you wanted any more time on that.

(Thereupon the Jury returned to the court room.)

The Court: The Jurors are now returned to the court room. We may proceed.

Mr. Hepperle: Q. We have reached the point, Mr. Drisko, [82] in respect of the cost for ten dollars per month for life, of a male aged 66, of an annuity, based upon the Metropolitan Life Insurance Company annuity rates. I intended to say 56. If I didn't that is the figure.

The Court: Well, actually, what he testified was 57, Mr. Hepperle.

Mr. Hepperle: In the other one, Your Honor, but this is a particular one he has to take.

The Court: Oh, I am sorry, the age he said that he had ascertained was 57 because it was the nearest birthday. Isn't that what you said?

The Witness: That was on the first bit of evidence.

The Court: Yes. But that is what you did say originally?

The Witness: That's right.

The Court: All right. Then that is for the life expectancy.

Mr. Hepperle: Thank you, Your Honor.

Q. Now, this cost for $10 per month for life is $2,148.18—will you explain in simple terms how you

(Testimony of Robert D. Drisko.)

would ascertain using that base figure for a cost of, cost for $400 per month for life?

A. You divide the $400 per month by the $10 per month and you get 40 units of $10 per month for life, multiply the figure given by forty.

Q. Now, will you turn to your additional exhibit in paper, [83] this one, did you determine the present value of various sums of money in relation to the age 57? Tell us what you did in that regard, if anything?

A. For age 57 I calculated the present value at two and one-half per cent rate of interest, and 3 per cent to provide for 460.

Mr. Martin: Your Honor, I am going to object to that again, upon the same basis I did on the other matter. We are speaking about specific figures here.

The Court: Yes. I think this should be broken down in the same fashion before you can do that, Mr. Drisko.

The Witness: I have it on my worksheet.

Mr. Hepperle: Excellent.

The Court: Well, then, go ahead.

Mr. Hepperle: Q. Tell us what you have on your worksheet. You explain it to me and the Court and Jury and counsel in your own way.

A. First of all, the definition of present value, if I may read it, "Present value may be defined as the sum of money which if invested or deposited in a trust or bank would be just sufficient to provide the monthly payments for the period stated.

(Testimony of Robert D. Drisko.)

provided that the interest on the balance in the account was credited each year at the rate shown, and at the end of that period both principal and interest would be exhausted. The life [84] expectancy of the person age 57 is found to be 16.05 years, the present value to provide one dollar per month for 16.05 years at an annual interest rate of two and a half per cent, is $158.65.

Q. Would you stop there for the moment? Now in order to calculate what it would take in the form of present value to provide, say, $400 per month, how would you go about using that base figure to ascertain that sum?

A. You would have to multiply the $158.85 by the $400, by the four hundred, since it is four hundred units, which you are talking about.

Q. Now was the life expectancy you spoke of in this instance based on age 57 and according to the American Experience Table?

A. It was.

Q. Did you also ascertain at the same age for white male age 57, what it was under the other table?

A. The value under the United States Life Table is, 1939 to '41, for white males is 16.98 years for a person aged 58.

Q. Now, can you similarly give us in relation to this last computation, using an annual interest rate of 3 per cent, did you get a base figure?

A. I do. The present value to provide one dollar

(Testimony of Robert D. Drisko.)

per month for 16.05 years at an interest rate of 3 per cent is $153.16.

Q. And it of course can be used just like the other in figuring on a larger sum, such as, for instance, present value [85] to provide $400 per month for the 16.05 years, or under the other table, the 16.98 years life expectancy?

A. The figure is for the 16.05 years. You do a similar sort of thing for the 16.98 years, but it has not been computed.

Q. That is all right. But all I meant was that, so the record would show, that you had a base figure at the two and a half per cent rate, you now have given us a base figure at the three per cent rate, right? A. That is correct.

Q. Secondly, in relation to the two and a half per cent figure, you showed how that could be used to find a return for, say, $400 per month?

A. That's right.

Q. And all I want is the record to show that the same method of computation can be used at the three per cent rate? A. That is correct.

Mr. Hepperle: You may cross-examine. Oh, pardon me. May I formally offer these merely—in line with Your Honor's ruling they become part of the record for identification?

The Court: They may be marked for identification only at this time. Plaintiff's Exhibits 21, 22 and 23, respectively.

Mr. Hepperle: Thank you, Your Honor.

(Thereupon the documents referred to were

(Testimony of Robert D. Drisko.)

marked for identification only as Plaintiff's Exhibits Nos. 21, 23 and 23.) [86]

Cross-Examination

Mr. Martin: Q. Mr. Drisko, in your computation I see you have been using a life expectancy which you have obtained from certain tables, is that correct? A. That is correct.

Q. So therefore when you use an age 57 with a life expectancy of 16.05 years, you are carrying the return then to the individual's age of 73; is that right, sir? A. That is correct.

Q. And in other words, your basic assumption then is an income of so much a month until age 73?

A. The basic assumption is the income for his expected lifetime, which happens to be to age 73.

Q. You know, of course, of your own knowledge, that more frequently than not people do not engage in active physical labor to age 73, do you not?

A. I would say they did not.

Q. Yes. Now, you have given us two different modes of computation here, one on an annuity which is purchased from a life insurance company, as I understand it, and one on a present value of a future sum of money, is that correct?

A. That's right.

Q. In other words, if one should go down to a life insurance company and say, "I want 'x' number of dollars per month for so many years for the rest of my life," the life insurance [87] company

(Testimony of Robert D. Drisko.)

would sell him an annuity which would cost him so much under this method you have testified; isn't that correct? A. That's correct.

Q. The cost of that annuity would exceed the present value of a sum of money for that same period of time, wouldn't it?

A. Will you repeat that again, please?

Q. I say, the cost of the annuity from a life insurance company would exceed by a considerable margin the present value of that sum of money, according to your tables, isn't that right?

A. I would say so, that is right.

Q. And that is because the insurance company is charging you profits and that same type of thing in your cost of an annuity, isn't that so?

A. That is one of the reasons, yes.

Q. And if a person should go out on the open market and buy a government bond, for instance, of 3 per cent, he could buy so many government bonds now and hold those bonds and assure himself of an income of so much a month for the balance of his lifetime or for whatever period he wanted to, couldn't he? A. He could.

Q. And he wouldn't have to go through an insurance company and have the insurance company's charges charged against him, would he?

A. He would not have to do that. [88]

Q. And Mr. Drisko, these present values of future sums of money that we have been talking about are contained in tables, aren't they?

A. They are.

(Testimony of Robert D. Drisko.)

Q. In other words, as I understand it, say on an annual basis you want an income of so much per year for a given number of years, say, ten years, you can consult the tables and get a factor, can you not, which will tell you how much to multiply the annual sum by to assure yourself that sum for a given number of years?

A. If you are specifically interested in a complete or integral number of years and also yearly payments rather than monthly payments, you can do that. There is one figure you can use, yes.

Q. Yes. I have here what I believe is such a table, Mr. Drisko, which is called Present Value of Annuity. I will ask you if that is the type of table we are just referring to?

A. That is the type, yes.

Q. Yes. Now,—excuse me one moment—assume for instance, that an individual aged 57 is going to work until age 65, that is a period of about 8 years, is that right? A. That is right.

Q. Can you tell me from this table what the factor would be for 8 years at 3 per cent.

A. The factor to provide one dollar per year for the 8 years [89] at 3 per cent is 7.0196922.

Q. And so we understand one another, if for instance, we wanted to assure an income for the next 8 years on an annual basis of, say, $3,000 annually, you would multiply that $3,000 by 7.0196922; is that right? A. That is correct.

Q. And to round it off in round figures, something like 7.0102?

(Testimony of Robert D. Drisko.)

A. Well, normally, I would use all of it and round off the answer to the nearest dollar.

Q. I see. Now, say we take the factor nine years at 3 per cent. What is the factor we get for that, that would be to age 66?.

A. Nine years, 3 per cent, the factor is 7.7861089.

Q. And for ten years to age 67, what factor do you get? A. 8.5302028 at 3 per cent.

Q. And for 11 years to age 68, what figure do we get?

A. Eleven years is 9.252624. It's light here.

Q. For 12 years at 3 per cent, that would be to age 69?

A. For that last one, for the 11 years, there is a light place. It isn't printed in the book.

Q. Well, you only have to take it to the fourth place.

A. For 12 years, it's 9.9540040.

Q. And for 13 years to age 70, what would that be? A. 13 years. It's 10.6349553. [90]

Q. Now, of course, that is assuming a rate of return of 3 per cent, is that right, on the investment? A. That is correct.

Q. And can you give me the respective figures for 8, 9, 10, 11, 12, and 13 years for four per cent?

A. Four per cent, starting with 8 years, why, yes. Four per cent, 8 years is 6.7327449; 9 years is 7.4353316; 10 years, is 8.1108958; 11 years is 8.7604767. What was that last one that you wanted?

Q. Twelve years and 13.

A. Twelve years is 9.3850738.

(Testimony of Robert D. Drisko.)

Q. And 13 years to age 70 would be what?

A. Thirteen years is 9.9856476.

Q. And then one more. Let's take it at 5 per cent for those same years?

A. Five per cent, eight years, is 6.4632128; 9 years is 7.1078217; 10 years is 7.7217349; 11 years, 8306—pardon me—8.3064142; 12 years is 8.86432516; 13 years at 5 per cent is 9.3935730.

Q. All right; now, you mentioned in one of your —in response to one of the questions put to you by Mr. Hepperle, that you defined present value and that sum, as I recall it, roughly, is the sum of money which if invested in a bank or trust would bring in a stated income for a definite period of time using both income and capital, is that correct? [91]

A. That is correct.

Q. So that at the end of that period of time there would be nothing remaining in the fund?

A. That is right.

Q. Now, you are familiar, are you not, that there are such things as investment trusts?

A. I am familiar with that, yes.

Q. And you are famliar with the fact that their history over the past 20 years shows a return and income of about 4.9 per cent?

A. I am not familiar with that, no.

Q. You are not familiar with that. Are you familiar with the fact that building and loan associations, which have government guarantees of funds deposited thereby, are returning about four and a half per cent on income?

(Testimony of Robert D. Drisko.)

A. It is my understanding that it depends on the particular guarantee that the government had. They vary somewhat between three and a half to perhaps—I have never seen it at four and a half—but four per cent, I have.

Q. Three and a half and four. And, of course, investment trusts, as you know, have widely diversified investments, is that correct?

A. I would imagine that they do, yes.

Q. Yes. They in turn invest this money in bonds and stocks and they have a managing board which controls the investment [92] and where the money shall be put under that, a board of experts to take care of that?

A. I would imagine that there would be, yes.

Q. So that the person investing in the investment trust has nothing to do with the management of the funds in the trust? A. That is right.

Mr. Martin: I believe that is all I have at this time, Your Honor.

Redirect Examination

Mr. Hepperle: Q. Mr. Drisko, have you and your firm had occasion to make studies and determinations of the rate of interest at which funds can be safely invested?

A. Our firm does set up pension plans for various businesses and for various city and county and state funds, and in that we take as a basis of the interest rate used what they consider to be a safe investment rate for other people's money.

(Testimony of Robert D. Drisko.)

Q. State, if you know, what that rate is?

A. The rates vary between two and three per cent. Generally two and a half seems to be the most popular rate.

Q. Counsel asked you in regard to the cost of the Metropolitan Life Insurance annuity whether that cost didn't include profits to the concern and you said that was one of the reasons. Will you tell us more what the other reasons are and describe that a little bit? [93]

A. One of the very important reasons would be the fact that they use an up-to-date life expectancy. The one quoted from the American Experience Table was devised back in 1868. Since that time there has been considerable improvements. The insurance companies all have them, use up to date values for life expectancy. They also use interest rates perhaps even lower than those quoted.

Q. You used the phrase "there has been considerable improvement." In what regard? Would you explain that please?

A. Well, as far as lifetime expectancy of number of years lived in 1868, as you can see, just looking at two of the figures I gave, in the 1868 one, which was the American Experience Table for the person aged 10, the life expectancy was another 48.72 years beyond age 10 back in the 1868 table. The 1939 to '41 table, it was up to 61.85 years beyond age 10. The 1931—'39 to '41 United States Life Tables are still not as high values as the ones

(Testimony of Robert D. Drisko.)

used by the insurance companies for their annuity rates.

Mr. Hepperle: That is all.

Recross-Examination

Mr. Martin: Q. So we can get this clear, Mr. Drisko, the figures you are using are based on full life expectancy and not work expectancy; isn't that correct? [94]

A. The figures whenever I mentioned life expectancy, that is right, full life expectancy.

Mr. Martin: Thank you.

Mr. Hepperle: That is all, Mr. Drisko.

(Witness excused.)

The Court: We will take the morning recess at this time. Ladies and gentlemen of the Jury, you will remember the admonition the Court heretofore has given you. We will take a brief recess.

(Short recess.)

The Court: Jurors are all present. You may proceed, gentlemen.

Mr. Hepperle: May I confer with counsel a moment, Your Honor?

The Court: You may.

Mr. Hepperle: We have here the question, Your Honor, that relates to tax. I have the official withholding statement from the Southern Pacific Company. I wish at this time to offer the total wages before payroll deductions paid in the years 1952 and 1953 respectively.

Mr. Martin: In line with our previous discussion, Your Honor, I am going to object to it unless I can show what the net was after deductions.

The Court: Well, I think under the circumstances in this case here I will permit the showing of both figures for the reasons I have heretofore indicated.

Mr. Martin: Very well, Your Honor.

The Court: If you desire to put it in, I will let you put it in, Mr. Hepperle, but it will be understood that the matter may be gone into as to the net.

Mr. Hepperle: Then, if Your Honor please, without waiving the point, I think perhaps the best way would be if I put in my evidence and let him put his up. Thank you.

The Court: All right.

Mr. Hepperle: It is stipulated between the parties, Your [96] Honor, that the plaintiff's decedent, Arthur V. Heavingham, was paid in the year 1952 by his employer, the Southern Pacific Company, before payroll deductions, $5,722.01, and in the year 1953 he was paid, before payroll deductions, the sum of $5,574.34.

Is it so stipulated?

Mr. Martin: Yes.

Mr. Hepperle: Mrs. Heavingham, will you take the stand, please?

MARY V. HEAVINGHAM,

the plaintiff herein, called in her own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of Mary V. Heavingham.)

Direct Examination

Mr. Hepperle: Q. Will you please state your name? A. Mary V. Heavingham.

Q. And your address?

A. 617 Wagner Street, San Lorenzo.

Mr. Hepperle: Counsel stipulates, Your Honor, that Mary V. Heavingham is the duly appointed and acting special administratrix in the matter of the estate of Arthur V. Heavingham, deceased, and as such is the legal representative in whose name and through whom this action is being maintained.

Mr. Martin: So stipulated, Your Honor. [97]

The Court: Very well.

Mr. Hepperle: That will save us that.

Mr. Clerk, will you please mark this as plaintiff's exhibit next in order for identification?

(Whereupon photostatic copy of marriage certificate was marked Plaintiff's Exhibit No. 24 for identification.)

Mr. Hepperle: Counsel stipulates, Your Honor, that there may be received in evidence Plaintiff's Exhibit No. 24, being a photostatic copy and certified copy of a marriage return setting forth the detail of the marriage of the deceased Arthur V. Heavingham and Mrs. Mary V. Heavingham.

Mr. Martin: So stipulated.

The Court: Wouldn't it be easier to stipulate that Mrs. Heavingham is the surviving widow of Mr. Heavingham?

Mr. Martin: Certainly.

Mr. Hepperle: I would like that, Your Honor.

(Testimony of Mary V. Heavingham.)

The Court: The only reason I suggest that, there isn't any question about that, or that Kathleen——

Mr. Martin: None at all.

The Court: ——is the surviving daughter.

Mr. Hepperle: Thank you, Your Honor.

The Court: Get to it that much quicker.

Mr. Hepperle: Then may I state preliminarily, I could do it through the witness but our figures will be more quickly, [98] I think, presented, that Mr. Arthur V. Heavingham at the time of his marriage was 23 years of age, that Mrs. Heavingham's age at that time was 18.

The Witness: That's right.

Mr. Hepperle: Q. What was your husband's birthday? A. June 4, 1897.

Q. And your own?

A. January 9, 1905.

Q. What was Kathleen's birth date?

A. February 12, 1944.

Q. And I, of course, am referring to your daughter Kathleen. When and where were you and your husband married?

A. We were married in Tacoma, Washington, 1923.

Q. And tell us in a brief way what his occupation was.

A. Well, at that time he was doing a little gardening for a gardener there.

Q. And did you remain in that area or did you go somewhere else?

A. Well, we came to Chico, California.

(Testimony of Mary V. Heavingham.)

Q. And was he employed there? A. Yes.

Q. By whom, if you please?

A. Well, I don't remember the name, but he worked for the Diamond Match Company.

Q. What did he do for them, if you recall? [99]

A. He worked in the lumber department.

Q. Later on did he do some other kind of work?

A. Yes, we came to here, to Oakland, and he was in the plastering business for a long time.

Q. Can you give us a rough estimate as to how long he was in the plastering business?

A. Well, I don't exactly remember, but he worked also for a laundry, he drove that laundry truck for seven years, too.

Q. And the plastering business, was it plastering such as in relation to building houses, and that sort?

A. Houses and buildings, large buildings.

Q. State whether or not in that work he also, in his preliminary years at least, carried mortar and plaster in what—— A. That is right.

Q. ——they call a hod-carrying apparatus?

A. That is right. If they didn't have a mixer, and he carried it up the ladder.

Q. How tall was he, about?

A. About six feet.

Q. And about what did he weigh at the time of his injury and death? A. About 165.

Q. State whether or not he was strong or otherwise. A. He was strong.

Q. And what, at the time—shortly prior to and

(Testimony of Mary V. Heavingham.)

for some [100] period before was his state of health, prior to this accident?

A. Well, you mean this last——

Q. Yes.

A. Well, he had improved a lot, and he was all right.

Q. Was he in good health? A. Very good.

Q. On the February date of this accident?

A. Very good health.

Q. About when, if you know, did he come to work for the Southern Pacific Company?

A. It was in 1942.

Q. And in what capacity did he gain employment with them? A. As a brakeman.

Q. State whether or not he continued to work as a brakeman and was employed as a brakeman at the time of his death. A. Yes, he was.

Q. Did he have any other jobs other than that for the Southern Pacific during this period from 1942?

A. No, except being a conductor part time.

Q. Yes, we refer to a brakeman and I am sure counsel and I understand, and I am a little remiss, perhaps, but beginning in 1942 your husband gained standing and seniority, did he not?

A. That's right.

Q. And he came to a point where he held, by seniority rights, the right to operate as a conductor, right? [101] A. That's right.

Q. State, if you know, whether he worked as both a freight and passenger conductor?

(Testimony of Mary V. Heavingham.)

A. That's right—no, I beg your pardon, he didn't work as a passenger conductor.

Q. He didn't have enough rights on that?

A. No.

Q. Had he been mostly in freight service?

A. Yes.

Q. Who handled his pay checks?

A. Well, he brought it home and we usually went together and cashed it.

Q. And what was it devoted to, the proceeds?

A. Well, most of it went to the home, the family.

Q. Tell us in your own way what sort of husband and father was he?

A. (Witness breaks down and starts crying.)

The Court: Would you like a little recess?

The Witness: Please.

The Court: You'd better step down, please.

(Witness leaves the stand.)

The Court: Ladies and gentlemen, we will take a brief recess at this time. Remember the admonition of the Court heretofore given. Or do you want to continue with another witness, Mr. Hepperle?

Mr. Hepperle: I think she'd better compose herself. We are going to move pretty fast.

The Court: Then we will be at recess briefly. Remember the admonition of the Court heretofore given.

(Short recess.)

Mr. Hepperle: Resume the stand, please.

The Court: The jurors are all present. You may proceed.

(Testimony of Mary V. Heavingham.)

(The witness resumed the stand.)

Mr. Hepperle: If I may, I should like permission to withdraw that question I last asked and I will, by question and answer, move more quickly and more satisfactorily.

The Court: Very well.

Mr. Hepperle: Q. Was Mr. Heavingham a family man? A. Yes, he was.

Q. Did he provide you with a home, that is, one that you bought and owned? A. Yes, he did.

Q. And is it the one you were in at the time of his accident and death? A. That's right.

Q. State whether or not he was a kind and agreeable father. A. He was.

Q. Was he interested in his family and in his children in respect of their activities?

A. Very interested. [103]

Q. What, if anything, did he do in becoming president of a club or organization on any occasion?

A. Well, he was very interested in the child welfare.

Q. Did he become an officer in a group over there? A. Yes, he was president.

Q. What is the name of that group?

A. President.

Q. Pardon?

A. President, Laurel Dads' Club.

Q. And what was the function of that club, what did he have to do with it, and what, precisely, was the work of the club?

(Testimony of Mary V. Heavingham.)

A. Well, they solicited the members to have a large club, and the dads all got together and gave dances—to raise money for the children.

Q. In other words, the name Dads' Club implies what it was, it was an organization for the benefit of children? A. That's right.

Q. In what way did they do things for the children?

A. Well, they—the money that they made they gave to—went for books and things that—special books that otherwise they wouldn't have had, and the milk fund, and so forth.

Q. Did I understand you to say milk fund?

A. Yes.

Q. Which went to needy children, I assume.

A. Yes. [104]

Q. With respect to going on picnics, was that a situation in your family? A. Yes, it was.

Q. Was that frequent or otherwise?

A. Quite frequently, whenever he was home.

Q. And what about trips to the snow country?

A. Yes, he done that, too.

Q. And tell us who would all go, and so on.

A. Well, the whole family went.

Q. Later on, as your older children grew up, state what the family relationship was with them; did you entertain each other, were you together? Just tell us briefly how.

A. Yes, we did. As soon as he would get home, why, he would be on the phone calling to come over.

Q. What would you folks do?

(Testimony of Mary V. Heavingham.)

A. Well, have barbecues and dinners.

Q. Did you have any—let me ask you this: Did he spend any time with your little daughter Kathleen? A. Why, yes, he did.

Q. State whether his affection was warm and extensive in relation to her. A. It was very.

Q. What, if anything, did he do in keeping her company and advising her, and that sort of thing?

A. Well, they watched television together, and, oh, just about [105] everything.

Q. Did they go places together?

A. Yes.

Q. Did he supply her with any money?

A. He always gave her an allowance.

Q. In addition to that did he have a special way of furnishing her with change and that sort of thing?

A. He always saved his small change for her.

Q. Did he, in your presence and hearing of the family, talk with Kathleen and guide and counsel her? A. Yes, he did.

Q. As Mr. Heavingham's seniority and his earnings on the railroad increased, did you begin to have more and more in the way of a better life?

A. Yes, we bought a better house.

Q. Is it the fact that as his seniority grew he was able to hold better runs than before?

A. Well, yes.

Q. And work more often than before?

A. Yes.

Q. Was that a continuing up-grade thing in

(Testimony of Mary V. Heavingham.)

relation to both the kind of run he could hold and the kind of money he could earn up to the time of his death? A. Yes, I believe so.

Mr. Hepperle: Mr. Clerk, will you please mark this as [106] Plaintiff's Exhibit next in order for identification?

The Court: We have a problem on that. The marriage certificate, did you withdraw that or not?

Mr. Hepperle: I didn't, Your Honor, but I would just as soon.

The Court: Doesn't make any difference to me; just like to keep the record straight.

Mr. Hepperle: I will leave it in, Your Honor.

The Court: It will be marked 24 for identification, and this picture will be marked 25 for identification.

Mr. Hepperle: Thank you.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 25 for identification.)

Mr. Martin: Your Honor please, there is one thing in connection with that birth certificate that I noticed on its face just a few moments ago; before it goes in could we discuss it?

The Court: It isn't in evidence, it is only for identification.

Mr. Martin: Oh.

The Court: And I assume from what Mr. Hepperle said he isn't going to offer it.

Mr. Hepperle: Not in the light of the stipulations, Your Honor.

(Testimony of Mary V. Heavingham.)

The Court: That's what I understood.

Mr. Hepperle: Yes, Your Honor.

Q. Mrs. Heavingham, I show you Plaintiff's Exhibit No. 25 [107] and ask you if that is a correct photograph—— A. Yes, it is.

Q. ——of the persons, true and correct of the persons that are shown thereon?

A. Yes, it is.

Mr. Hepperle: We offer in evidence Plaintiff's Exhibit No. 25.

Mr. Martin: Who are the persons shown?

The Court: I don't know who it is.

Mr. Hepperle: I thought I would get at it this way, or this way.

Q. First, who is the gentleman shown in the picture? A. Mr. Heavingham.

Q. Your husband? A. Yes.

Q. And who is standing immediately next to his left? A. My eldest daughter.

Q. And then who is next to her?

A. Myself.

Q. And who is the little girl?

A. Kathleen.

Q. Can you tell us the occasion on which this picture was taken?

A. That was taken at my daughter's wedding.

Q. And the daughter who is shown here as the older daughter——[108] A. Yes.

Q. ——in the picture? A. That is right.

Mr. Hepperle: I now renew my offer of Plaintiff's Exhibit 25.

(Testimony of Mary V. Heavingham.)

The Court: Let it be received and marked Plaintiff's Exhibit 25.

(Whereupon the photograph referred to above was received in evidence as Plaintiff's Exhibit No. 25.)

Mr. Hepperle: May I just hold it up a moment before the jury?

The Court: You may, or they may have it in the jury room.

Mr. Hepperle: If I could take just a minute.

The Court: All right.

Mr. Hepperle: Can you folks see that? (Showing picture to the jury.)

Mr. Hepperle: You may cross-examine.

Cross-Examination

Mr. Martin: Q. I will be as brief as I can, Mrs. Heavingham.

Mrs. Heavingham, during the time that your husband was working with the Southern Pacific Company, was your home always in and around Oakland? A. Yes.

Q. And Mr. Hepperle mentioned that you have grown children of [109] this marriage, is that correct? A. Yes, that's right.

Q. And they, in 1954, were not a part of your household, is that right? A. That's right.

Q. They had married and left the home?

A. Yes. [109A]

Mr. Martin: Q. Now, I believe you said, Mrs.

(Testimony of Mary V. Heavingham.)

Heavingham, that your husband worked principally in freight service, is that correct?

A. Mostly, yes.

Q. And as both a freight brakeman and a conductor, is that right? A. Yes.

Q. And in connection with that service, Mrs. Heavingham, it was frequently part of his job to be away from home, is that right?

A. That's right.

Q. In other words, as a matter of fact, at that time he was working when this accident occurred, he was based in Roseville, is that right?

A. Yes.

Q. And that is not unusual in Mr. Heavingham's history with the Company, is that right?

A. That is right.

Q. Would you say that he was based away from home about half the time?

A. Well, he wasn't on this particular run. He was away from home a lot.

Q. And he held this job before, had he?

A. Well, it was just several months. I don't know exactly how many, maybe three or so. [110]

Q. And he had held similar jobs where he was based away from home in the past, is that correct?

A. Well, not too much. Mostly home a couple of days or something.

Q. You say mostly he would be home a couple of days? A. Usually.

Q. And then he would be away on the road for five days a week, is that right?

(Testimony of Mary V. Heavingham.)

A. No. I mean he would be out a couple of days and maybe home again and then out again.

Q. I see. However, on the particular job he was doing at this time that we are concerned with, he was out for five days at least a week, is that correct? A. Yes.

Q. And what I am trying to get at, Mrs. Heavingham, is in the general course of his work with the Company, there were frequent occasions when he would be out for periods of several days, is that correct? A. On this particular job, yes.

Q. And on other jobs he had held before, is that right? A. Yes.

Q. And during those times he would live in a hotel wherever he was, is that correct?

A. Yes.

Q. And presumably take his meals wherever he was, is that correct? [111] A. Yes.

Q. And I believe you stated, Mrs. Heavingham, that your husband ordinarily would bring his check home and you would cash it together, is that right?

A. Yes.

Q. And then he would take from the bank, I presume, whatever he required for his personal expenses, is that right?

A. Well, he would always ask me for what money he needed.

Q. I see. But he did take sums of money for his own personal expenses such as meals, clothing, and that type of thing, is that right?

A. That's right.

(Testimony of Mary V. Heavingham.)

Q. And would you say that that sum of money would average, say, a hundred dollars a month?

A. I don't think so. I never kept track of it, but I don't think he ever——

Q. Could it have averaged a hundred dollars a month?

A. Well, I don't think it would be that much.

Q. When he was working, even when at home, he would eat away from home, is that correct, while on the job? A. While on the job, yes.

Q. And do you recall, Mrs. Heavingham, about what the average pay check was for, say the year, the average pay check that he brought home for the year 1954 or '53, I beg your pardon? [112]

A. Well, I guess it was about four hundred and sixty. I don't know because they varied. I didn't stop to figure it out.

Q. I see. Let me ask you this: Would it be correct to say that his average take-home pay, the check that he cashed at the bank would run around $375 a month?

A. Well, sometimes it was that.

Q. I am speaking of the whole year of 1953?

A. Well, like I said, I didn't you know, figure it out.

Q. But would that figure seem unreasonable to you as an average?

A. Well, lots of time it was more, sometimes less.

Q. Oh, I understand. Specific checks varied. But I am trying to get it based for the whole year, Mrs.

(Testimony of Mary V. Heavingham.)

Heavingham, and if I were to tell you that or to suggest to you that it was around $375 average per month—— A. Well, it could be.

Q. So that we are clear on this, Mrs. Heavingham, the expense Mr. Heavingham did draw on occasion, regularly, were sums of money for his own use, personal use, is that correct?

A. Well, I always gave it to him, whatever he asked.

Q. And out of the balance you ran the house, is that correct? [113] A. Yes.

Q. And provided the food for the family?

A. Yes.

Q. And I suppose both he and you bought the clothing for him, is that right?

A. That's right.

Mr. Martin: I believe that is all that I have at this time, Your Honor.

Redirect Examination

Mr. Hepperle: I shall be very brief, Your Honor.

The Court: Very well.

Mr. Hepperle: Q. In respect of your husband's character and personality and so on, was he a frugalant saving person or not?

A. Yes, he was.

Q. While I appreciate you can't give us figures and Mr. Martin understood that in his questions, I want to ask you in the light of his own questions, would you say that practically everything your husband made went for yourself and your family?

(Testimony of Mary V. Heavingham.)

A. Just about.

Mr. Hepperle: I think that is all.

Mr. Martin: I have nothing further, Your Honor.

Mr. Hepperle: You may step down.

(Witness excused.)

Mr. Hepperle: Mr. Clerk, will you please mark this as Plaintiff's Exhibit next in order for identification?

May it be stipulated that Exhibit No. 26, Plaintiff's Exhibit, is a certified copy of the death record of Arthur Victor Heavingham, the deceased involved in this lawsuit?

Mr. Martin: So stipulated.

Mr. Hepperle: And that it may be received in evidence as such exhibit, subject to His Honor's approval, Exhibit No. 26?

Mr. Martin: If Your Honor please, there is a matter I wish to take up with the Court in this connection, I would like to take it up in the absence of the Jury.

The Court: Well, you mean about this document here?

Mr. Martin: That is correct, Your Honor.

The Court: Well, now, we are confronted with the same problem again. This is admitted in the pleadings, that Mr. Heavingham is dead.

Mr. Martin: That is right, Your Honor. That is the basis of my objection, that it is admitted in the pleadings and that this has no probative value. I don't think it has any probative value. That is the only reason I have mentioned that.

Mr. Hepperle: Yes. I am not offering it solely for the purpose, however, of proof of death. I am offering it under the Code Section which makes it admissible in evidence. [115]

The Court: Well, if we are going to get into a discussion about the matter, I want to do that in the absence of the Jury.

Mr. Hepperle: Perhaps, Your Honor, I might save some time by handing you this. May I now hand up the Code Section?

The Court: I am familiar with the Code Section.

Mr. Hepperle: And that is prima facie evidence in all courts and places of the facts stated in it.

The Court: Well, under the circumstances, then I suppose we had better discuss this matter.

Ladies and Gentlemen of the Jury, under the circumstances, Your Honor, then I suppose we had better discuss this matter.

Ladies and Gentlemen of the Jury, I will excuse you at this time. You may be on your lunch hour at this time, but we are going to return at 1:30, half-past one today, to proceed with the trial of this case. So you remember the admonition of the Court and you may leave at this time.

(Whereupon the Jury retired from the court room, and the following proceedings were had outside the presence of the Jury.)

Mr. Hepperle: Our position is, Your Honor—may I proceed?

The Court: Yes, you may. The record may show

that the jurors are outside of the court room beyond the hearing of these proceedings. [116]

Mr. Hepperle (Continuing): ——is that this record is absolutely admissible under this Statute and under the decisions and we are offering it not only for the purpose of showing the death, but under the particular phrasing of the Statute, reading as follows:

"Any photostatic copy of the record of a birth, death or marriage, or a copy, properly certified by the State or local registrar or County Recorder to have been registered within a period of one year from the date of the event, is prima facie evidence in all courts and places of the facts stated in it."

Your Honor, of course, in the many years of practice, I have again and again come across the same point in relation to cause of death under insurance policy, cause of death in an accident.

The Court: Well, Mr. Hepperle——

Mr. Hepperle: Yes, Your Honor?

The Court: Perhaps I can focus the problem that is confronting me here. I assume that what you want to do is get into evidence this statement here:

"That the deceased came to his death from scalding burns over the entire body," and so forth?

Mr. Hepperle: Yes, Your Honor. [117]

The Court: Well, may I point out to you that this document shows on its face that the deceased died instantly. It can't be otherwise because it says here the time of the injury, 2-24-54, 2:30 a.m. Date of death, February 24th, 1954, 2:30 a.m.

Mr. Hepperle: My position in the case, Your Honor, was this: That all the facts, whatever they may be, should go in, and I want that in. And I appreciate, Your Honor, very much calling my attention to this, but may I briefly state our entire picture as we saw it? It was this——

The Court: Well, Mr. Hepperle, is it understood you are going to put this in evidence, you are going to be bound by this, and you can't have your cake and eat it too.

In other words, if one part goes in, it all goes in. And in the face of that record, you would want it to go in evidence, why, I think you are entitled to have it go in. But I didn't want to have another argument come up a little later on that you are only bound a little bit by this evidence here.

Mr. Hepperle: Well, in view of Your Honor's statement and in view of the particular type of case this is, and the care that has been given it by Your Honor and, I think, counsel and myself, I will be guided by Your Honor's views and——

The Court: I just wanted to make the position clear, [118] Mr. Hepperle: I am projecting the thing out now because I know that it's going to happen, at least I think I do—maybe I am anticipating something that will never happen, but I suspect that the defense is immediately going to take this document and says this proves conclusively to the Jury here that there is no period of suffering involved in this case here. When that is established, then the only purpose that this could

have, scalding burns over the entire body, would be for the purpose of inflaming the Jury.

Mr. Martin: That is correct, Your Honor.

The Court: And I am awfully afraid of the thing; I am awfully afraid of it.

Mr. Hepperle: Well, then, I will be guided by Your Honor's views.

The Court: Have you any other—Now, I am not going to tell you gentlemen how to run your lawsuits.

Mr. Hepperle: I know that.

The Court: I am here just as the umpire and if there is an objection before me—and perhaps I should keep my mouth shut, but I frequently think out loud in these matters here and I am anticipating something because we are running out of time, so to speak.

But now, do you have anything else you want to —Yes, Mr. Martin?

Mr. Martin: Your Honor, I wish to enter an objection for [119] the record. I realize that that Statute that counsel has stated, but I will make my objection upon the ground that the information contained here as to cause of death is hearsay and, secondly, there is no foundation laid because the fact that the cause of death that is given there is scalding burns over the entire body does not tend to establish that there is any conscious pain and suffering in this case because there is no evidence in the record at all as to any survival beyond the time of impact.

The Court: I don't think there is any merit to

your objection that this isn't admissible because that has been gone into pretty thoroughly, that it is admissible. As to the prima facie proof of anything, it is not just prima facie proof of a little bit, but of the whole thing. That is what I am pointing out, that is the danger of this thing. So I leave the matter with you gentlemen. It has been offered into evidence. You have raised an objection on the matter, Mr. Martin, and it's my opinion at this time that it's admissible in evidence. But I say that solely because it's a question of fact for this Jury to determine here and not for me to determine at this stage of the proceeding and I think the thing is full of all sorts of trouble.

Mr. Hepperle: Suppose we do this with Your Honor's approval. We are almost at twelve, about a minute, a couple of minutes left. Let us study it over the noon hour. We [120] have understood Your Honor's views, and I think we can move quickly.

The Court: Let's do this: If it is your intention to offer this in evidence, I will admit it in evidence at this time, but if you want to withdraw the offer and renew it later on, that is your way of handling it. But I want to bring this to a head now so we don't have anything hanging over during the lunch hour.

Mr. Hepperle: Thank you, Your Honor. We withdraw the offer at this time of Plaintiff's Exhibit No. 26.

The Court: Well, it may be marked for Identification only at this time.

Mr. Hepperle: Yes, Your Honor.

The Court: And then it will stand that way unless it's re-offered at a later date. I will say, Mr. Martin, unless you can convince me otherwise—it won't be the first time that I have been shown that I was wrong about something, why, it's my opinion that this document is admissible in evidence, but it's not a little bit admissible, it's admissible all the way.

Mr. Martin: Well, I don't know if I made myself clear, Your Honor. My only thought is, as far as—I realize that there is a conflict in the document—but my position again, to make it clear to Your Honor, is——

The Court: Well, isn't it your position, Mr. Martin, that [121] it has no probative value, is that correct?

Mr. Martin: Yes.

The Court: All right. That is a question of fact. I do not think—I have told you gentlemen earlier, and I repeat again—that I am very scrupulous, maybe too scrupulous, about taking matters away from the Jury. Once the case is to be tried by a jury, I say try it with the jury, not put me in a position where I have got to decide all the tough ones and let them have the easiest ones to decide.

Mr. Martin: Very well, Your Honor. Only one other matter; Mr. Hepperle and I were discussing this out in the hall a few moments ago.

As I understand it, Mr. Hepperle, you are near the conclusion of your case?

Mr. Hepperle: Yes.

Mr. Martin: And I expect my case will be very brief, Your Honor, no more than half an hour.

Now, under the circumstances we will probably run out of testimony about two'clock. What is Your Honor's wish as to how to proceed from there?

The Court: Well, I have already indicated to you my wishes in the matter. In addition to that I have picked up one of your San Francisco colds, which doesn't add anything to my desires to remain in your City here. But if my wish is to be given any consideration—and I am sure you [122] gentlemen will, insofar as you feel it can without depriving your clients of any rights, I would like you to argue the case and get it out of the way so I can instruct the first thing in the morning. Now if that can be done—but if this thing is to go over, run over to a place where's it's going to mean an extremely late session or any other course of events that would make it impractical, then I would let you argue tomorrow morning and instruct immediately after lunch.

Mr. Hepperle: Thank you, Your Honor. I would like to give that consideration during the noon hour and I will see whether there isn't a way for us to shorten it so that we could,—because all of us, I am sure, this particular circumstance, even, on our own would like to finish it if it can be done.

The Court: Well, I propose to see the case finished regardless of what the situation is. And, as I say, if we have to run a long session or even a night session today in order to accomplish that, I

shall do it, but on the other hand, I am very reluctant to do anything that would make it difficult or impossible for either side to receive a full and complete and fair hearing in this matter. So I simply tell you what the situation is and act accordingly on the matter.

While we are talking about matters here, I am not now expressing any final views, I am simply telling you what has occurred in my mind up to the present time, and perhaps you [123] ought to give this some thought during the lunch hour. I think so far as the plaintiff is concerned, that there is no substantial evidence here that this case up to the present time would warrant any award for pain and suffering of the deceased. Now that is just my view of the evidence. I am still going to let it go to the jury regardless of what my views are on it. I am telling you this so you know what is going on in my mind. I will say also that I think that the evidence is completely devoid of any substantial showing that the deceased was guilty of contributory negligence in this case.

In other words, I think each of you have made a point or are making a point that you are just pursuing a will-o'-the-wisp, and I want to repeat again two things:

Number One, it's your case to try, and I am not going to tell you what to do or how to do it.

Number Two, I am going to say that when you

go ahead and proceed with your case I am going to give this jury a full opportunity to decide it. But I think you ought to seriously consider those two problems during the lunch hour and see if you don't want to do something about it.

Now, I am not going to interject myself in the case. I promise you now that I will not make any comment on the evidence to the Jury. I don't believe in it and I am not going to do it. So you are perfectly safe from me giving an [124] instruction, when I instruct this Jury, that I think the claims of the plaintiff are unjustified on this one item, or that I think the claim of the defendant, that there is contributory negligence or something, is unjustified. I am not going to do it. But I tell you that that is what is going on in my mind. I think if the Jury should find otherwise on either one of those, I should be obliged to upset your verdict in this regard.

Now, this exception to that: I haven't heard all the evidence, I may change my mind completely when I have heard the balance of the evidence. But at this stage of the case, why, that is my feelings.

I tell you that. I hope you will understand my position so that I am not forcing anything upon you. I am not advocating anything to you. I just want to be fair with you as I am sure you are being fair with me, and telling you what is going on in my mind here. It is pretty difficult to know what

is going on in the mind of a Judge. It is pretty difficult to know what he thinks. But nevertheless, I want to be fair and tell you what is going on in my mind. Very well, 1:30.

(Whereupon an adjournment was taken in this cause until the hour of 1:30 o'clock p.m., this date.) [125]

Afternoon Session, Thursday, Feb. 3, 1955,
1:30 O'clock p.m.

The Court: The Jury are all present, you may proceed, gentlemen.

Mr. Hepperle: I now formally offer in evidence, Your Honor, Plaintiff's Exhibit No. 26, being the certified copy of death record.

Mr. Martin: Object to it on the grounds previously stated.

The Court: Objection will be overruled, be admitted in evidence.

(Thereupon death record referred to above, formerly marked Plaintiff's Exhibit No. 26 for Identification, was received into Evidence.)

33393

CERTIFIED COPY OF DEATH RECORD

REGISTRATION DISTRICT NO 5700 REGISTRAR'S NUMBER 66

DECEDENT. PERSONAL DATA (TYPE OR PRINT NAME)	1a NAME OF DECEASED—FIRST NAME: ARTHUR	1b MIDDLE NAME: VICTOR	1c LAST NAME: HEAVINGHAM	2a DATE OF DEATH – MONTH DAY YEAR: Feb. 24, 1954	2b HOUR: 2:30 A.	
	3 SEX: male	4 COLOR OR RACE: white	5 MARRIED, NEVER MARRIED, WIDOWED, DIVORCED?: married	6 DATE OF BIRTH: June 4, 1897	7 AGE (LAST BIRTHDAY): 56 YEARS	IF UNDER 1 YEAR: MONTHS / DAYS; IF UNDER 24 HOURS: HOURS / MINUTES
	8a USUAL OCCUPATION (GIVE KIND OF WORK DONE DURING MOST OF WORKING LIFE, EVEN IF RETIRED): Brakeman	8b KIND OF BUSINESS OR INDUSTRY: S.P. Co.	9 BIRTHPLACE (STATE OR FOREIGN COUNTRY): Canada	10 CITIZEN OF WHAT COUNTRY?: USA		
	11 NAME AND BIRTHPLACE OF FATHER: Frederick Heavingham England	12 MAIDEN NAME AND BIRTHPLACE OF MOTHER: Alice Glover England	13 NAME OF SPOUSE (IF MARRIED): Mary V. Heavingham			
	14 WAS DECEASED EVER IN U. S. ARMED FORCES? (SPECIFY YES, NO, UNKNOWN): yes (IF YES, GIVE WAR OR DATES OF SERVICE): WWI	15 SOCIAL SECURITY NUMBER: 565-07-0760	16 INFORMANT: Chester A. Heavingham			
PLACE OF DEATH	17a PLACE OF DEATH – CITY OR TOWN (IF OUTSIDE CORPORATE LIMITS, WRITE RURAL AND NAME OF NEAREST TOWN): Yolo Co. (near Davis)	17b LENGTH OF STAY (IN THIS PLACE): passing	17c COUNTY: Yolo			
	17b FULL NAME AND ADDRESS OF HOSPITAL OR INSTITUTION – (IF NOT IN HOSPITAL OR INSTITUTION GIVE STREET ADDRESS OR LOCATION): not in a hospital					
USUAL RESIDENCE (WHERE DECEASED LIVED; IF INSTITUTION, RESIDENCE BEFORE ADMISSION)	18a STREET ADDRESS (IF RURAL, GIVE LOCATION): 617 Wagner St., San Lorenzo	18b CITY OR TOWN (IF OUTSIDE CORPORATE LIMITS, WRITE RURAL AND NAME OF NEAREST TOWN):	18c COUNTY: Alameda	18d STATE: Calif.		
CAUSE OF DEATH (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)	THIS DOES NOT MEAN THE MODE OF DYING SUCH AS HEART FAILURE, ASTHENIA, ETC. IT MEANS THE DISEASE, INJURY OR COMPLICATIONS WHICH CAUSED DEATH	19 DISEASE OR CONDITION DIRECTLY LEADING TO DEATH: (a) Scalding, burns over entire body				APPROXIMATE INTERVAL BETWEEN ONSET AND DEATH
		ANTECEDENT CAUSES MORBID CONDITIONS, IF ANY, GIVING RISE TO THE ABOVE CAUSE (a) STATING THE UNDERLYING CAUSE LAST: DUE TO (b) When locomotive in which he rode				
		DUE TO (c) crashed into another train.				
	19 II OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO THE DEATH BUT NOT RELATED TO THE DISEASE OR CONDITION CAUSING DEATH					
OPERATIONS	20a DATE OF OPERATION	20b MAJOR FINDINGS OF OPERATION			21 AUTOPSY: ☐ YES ☒ NO	
DEATH DUE TO EXTERNAL VIOLENCE	22a ACCIDENT / SUICIDE / HOMICIDE (SPECIFY): accident	22b PLACE OF INJURY (E.G., IN OR ABOUT HOME, FARM, FACTORY, STREET, OFFICE BUILDING, ETC.): S.P. Railroad	22c LOCATION – CITY OR TOWN, COUNTY, STATE: 1 mi east Davis Yolo Calif.			
	22d TIME OF INJURY – MONTH DAY YEAR HOUR: 2-24-54 2:30 A.M.	22e INJURY OCCURRED: ☒ WHILE AT WORK ☐ NOT WHILE AT WORK	22f HOW DID INJURY OCCUR?: as stated above			
PHYSICIAN'S OR CORONER'S CERTIFICATION	23a ☐ CORONER'S I HEREBY CERTIFY THAT I HAVE HELD AN ☐ AUTOPSY ☐ INQUEST OR ☒ INVESTIGATION ON THE REMAINS OF THE DECEASED AND FIND THAT THE DECEASED CAME TO DEATH AT THE HOUR AND DATE STATED ABOVE.	23b PHYSICIAN'S I HEREBY CERTIFY THAT I ATTENDED THE DECEASED FROM ____, 19__ TO ____, 19__ THAT I LAST SAW THE DECEASED ALIVE ON ____, 19__ AND THAT DEATH OCCURRED FROM THE CAUSES AND AT THE HOUR AND DATE STATED ABOVE.				
	23c SIGNATURE, DEGREE OR TITLE: W. C. McNary Coroner of Yolo Co.	23d ADDRESS: Woodland, California	23e DATE SIGNED: 2-25-54			
FUNERAL DIRECTOR AND REGISTRAR	24a ☒ BURIAL ☐ CREMATION ☐ REMOVAL	24b DATE: 3/1/54	24c CEMETERY OR CREMATORY: Mt. View, Oakland	25 SIGNATURE OF EMBALMER: M.W. Schluer	LICENSE NUMBER: 2844	
	27 DATE RECEIVED BY LOCAL REGISTRAR: 2/25/54	28 SIGNATURE OF LOCAL REGISTRAR: Herbert Bauer, M.D./EP	26 FUNERAL DIRECTOR: GRANT D. MILLER MORTUARIES			

DATES OF AMENDMENTS IF ANY

CERTIFICATION STATEMENT	This is to certify, that the foregoing is a true and correct copy of statements appearing on the record of death of the above named decedent as filed in this office.
SIGNATURE OF CERTIFYING OFFICIAL: Herbert Bauer, M.D. E. Musgrove, Deputy	OFFICIAL TITLE: Health Officer
PLACE OF CERTIFICATION: Yolo County Health Department	DATE OF CERTIFICATION: 5/11/54

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH

A 1-50
FORM R&S 196

Mr. Hepperle: I likewise formally re-offer Plaintiff's Exhibits 1 to 12, inclusive, being the photographs heretofore identified and marked, and the other group of photographs, Thirteen to Twenty, respectively, and each of the photographs in those two named exhibits separately and by themselves.

Mr. Martin: Objection upon the grounds previously stated, Your Honor.

The Court: Let me see the large photographs.

(Court looking at Exhibits 1 to 12.)

The Court: Let me see the small ones again, please. [126]

(Court looking at Exhibits 13 through 20.)

The Court: For purposes of illustration and for no other purpose I will permit the photographs heretofore marked Plaintiff's Exhibit 13 for Identification and Plaintiff's 16 for Identification to be received in Evidence. The objection is sustained to the others on the ground that they serve no useful purpose in this case would have no probative value.

(Thereupon Plaintiff's Exhibits Nos. 13 and 16, previously marked for Identification only, were received in Evidence.)

Mr. Hepperle: May I briefly recall the fireman to identify some of these items, and after I have done that, Your Honor, I might state the plaintiff will rest.

The Court: Very well, you may do so.

Mr. Hepperle: Mr. Maasen, will you come forward, please?

GEORGE E. MAASEN

was recalled as a witness on behalf of the Plaintiff, and being previously sworn, resumed the stand and testified further as follows:

Further Redirect Examination

Mr. Martin: Counsel, may I see the pictures first?

Mr. Hepperle: Oh, surely, surely.

I wonder, Your Honor, if I might have your permission [127] to stick them on the blackboard and then he could use the pointer and describe them better than otherwise.

The Court: Very well.

(Putting photographs on blackboard.)

Mr. Hepperle: May we have the board brought forward a little closer, Your Honor, and I will have the witness, with Your Honor's permission, step down here, and I think he can cover it very quickly.

The Court: I want all the jurors to be able to see, and I want to be able to see, too.

Mr. Hepperle: How would it be if temporarily we brought it out here (indicating)?

The Court: If he can step down right there and stand on this side towards this way, then I can still see and not be in front of the jurors.

Mr. Hepperle: Very good.

The Court: Will you step down here on this side. That is fine.

Mr. Hepperle: Q. Now, would you take this pointer, and I will stand back not to obstruct the

(Testimony of George E. Maasen.)

view, and take the first picture to the left on the board, Plaintiff's Exhibit No. 13, and point out what railroad equipment is shown in that picture, with your pointer?

A. Part of the locomotive.

Q. Stand back just a little, if you can. Was that *the* [128] involved in this accident?

A. That's the picture of it.

Q. And the number of the locomotive was what?

A. 4231.

Q. You have talked about the front end of this as being a mallet engine and locomotive. Will you point that out? I think perhaps we will do it better if you will describe to us what is there; I will ask you to do it and you tell it. The front end you have talked about is shown there as caved in. Which was the fireman's side, which was the engineer's side?

A. This was the engineer's side; the opposite side was the fireman's side.

Q. And the fireman's side was your side?

A. That's right.

Q. Now, you have spoken about the engineer and fireman by their respective positions on their seat boxes, each one's window open and looking ahead. Can you point out on this side the approximate location of that seat box and the window referred to?

A. That is the window. The seat box is on the inside just below the window.

Q. Now, does that photograph depict what you

(Testimony of George E. Maasen.)

described in your testimony, or called, a monkey deck? A. No. [129]

Q. Can you give us some idea from that picture as to where and how you got around, as you testified in your testimony?

A. No, there is only part of the engine there, the monkey deck is not there, of course, it is down in this vicinity.

Q. Is the tender shown? A. No, sir.

Q. On this? A. No, sir.

Q. It is clear that on the part off to the left would be the rear end of this locomotive and the attached water tank or tender?

A. That's right.

Q. Now, turn to this photograph No. 16. Do any of the parts there show which you used in getting around? A. No.

Q. What is shown there? You tell it to the Court and Jury and for the record.

A. The cab of the engine and the caboose and boxcar.

Q. Right in front of the man standing to the left in the foreground is an iron structure. Is that what you referred to as the ladder?

A. That's the ladder.

Q. And normally does each side have such a ladder? A. Yes, sir.

Q. State whether or not the ladder on your, the fireman's [130] side, the other side, remained on or not?

(Testimony of George E. Maasen.)

A. This—in this particular picture this is the fireman's side.

Q. This one is? A. Yes.

Q. And state whether or not that ladder is broken loose? A. Yes, it is.

Q. Did you use it in negotiating your way coming and going in the various activities you mentioned?

A. I started down it one time and, of course, the the ladder wasn't in position and I fell down.

Q. Can you tell us somewhat of how you got around from one side to the other of this engine, whether it was always, or in each instance, by use of the monkey deck or whether you ever got around in front of it?

A. No, it was always by the monkey deck. I couldn't get around in front of it.

Q. What is the object in between the car marked "automobile, Southern Pacific" and the front of that locomotive in that picture, Plaintiff's Exhibit No. 13? A. The caboose.

Mr. Hepperle: I think that will suffice.

Further Recross Examination

Mr. Martin: Q. Mr. Maasen, while you are there looking [131] at Plaintiff's Exhibit 13, the photograph on the left, will you indicate in which direction the locomotive was proceeding immediately before the impact occurred, from left to right or right to left?

(Testimony of George E. Maasen.)

A. It was proceeding east, which would be in that direction. (Indicating).

Q. From left to right?

A. From left to right.

Q. Yes. So therefore I take it the cab of the locomotive was actually at the front end of the locomotive, is that right, in the direction of travel?

A. Yes, sir.

Mr. Martin: That is all I have on the pictures, Your Honor, but there is one question I omitted to ask and I would like permission of the Court to ask it of Mr. Maasen.

Mr. Hepperle: We have no objection.

The Court: Proceed.

Mr. Martin: Q. Just be seated, please, Mr. Maasen. Mr. Maasen, how long did you say you had been employed by the Southern Pacific Company?

A. About thirteen years.

Q. I see. And from your experience—let me withdraw that, I don't think you are qualified to answer this question.

Mr. Martin: That is all I have, Your Honor. Thank you.

Mr. Hepperle: That is all, Mr. Maasen. [132]

If Your Honor please, the plaintiff rests.

Mr. Martin: Call Mr. Alsing.

HENRY E. ALSING

was called as a witness on behalf of the Defendant, after being duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your full name to the Court and Jury.

The Witness: Henry E. Alsing.

Direct Examination

Mr. Martin: Q. Mr. Alsing, by whom are you employed? A. Southern Pacific Company.

Q. And for how long have you been employed by that company?

A. A little over forty-three years.

Q. And what is the—what capacity do you have with the Company, sir?

A. Secretary, Board of Pensions.

Q. And how long have you been in that department of the railroad?

A. Thirty years next month.

Q. And as such, Mr. Alsing, do you have knowledge of the matters of voluntary retirement of Southern Pacific Company employees?

A. I do. [133]

Q. That includes train men?

A. Yes, sir.

Q. And for the purposes of the record, are conductors and brakemen classified as train men?

A. Correct.

Q. And, Mr. Alsing, let me ask you this: have you figures, Mr. Alsing, upon the matter of the total

(Testimony of Henry E. Alsing.)

number of brakemen—withdraw that—of trainmen employed by the Southern Pacific Company as of December last? A. Yes, sir.

Q. And will you give us that figure?

Mr. Hepperle: Just a moment. That is objected to as wholly immaterial, not an issue here, the injection of extraneous and collateral matter.

Mr. Martin: It won't be extraneous or collateral, Your Honor.

The Court: Objection overruled.

Mr. Martin: Q. Will you please the state that figure?

A. As of the middle of December we had 4,090 train men on the system.

Q. And of that number how many were over the age seventy, Mr. Alsing?

A. As of today there are eighteen.

Q. And, Mr. Alsing, with reference to the requirements of [134] the railroad, are there any special restrictions placed upon train men who work or attempt to work after age seventy?

A. Yes, sir, there is.

Q. And what are they, please?

A. They are required to undergo special physical examinations, and also they must have the recommendation of the superintendent as to whether they are properly performing their duties, and whether they are—that is, working around trains, they would have to be alert and able to get up and down on the trains.

(Testimony of Henry E. Alsing.)

Q. And with what frequency are they given physical examinations after age seventy?

A. After seventy special physical examinations every three months.

Q. And in connection with your many years in the department, Mr. Alsing, can you tell us, based upon your experience, what the average age of voluntary retirement of a train man is?

Mr. Hepperle: Objected to upon the ground, for the reason that it is not binding upon the plaintiff in this case, that it invades the province of the Court and Jury, and an attempt by mere declaration of an interested employee, however qualified, to resolve issues in favor of the defendant and against the plaintiff.

The Court: I don't think that you should make a statement [135] like that in making your objection. I instruct the Jury to disregard the statement Counsel just made. It is a law problem and not any dissertation on the qualifications of this witness here.

I overrule the objection.

Mr. Martin: Q. Do you have the question in mind? A. No, I don't.

Mr. Martin: May I have the Reporter read it back, Your Honor?

(Question read.)

A. I would estimate between sixty-six and sixty-seven.

Mr. Martin: You may cross-examine.

Mr. Hepperle: No cross-examination.

Mr. Martin: That is all. Thank you, Mr. Alsing. Mr. Hoffman, will you please take the stand?

LOREN M. HOFFMAN

was called as a witness in behalf of the Defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: State your full name to the Court and Jury.

The Witness: My name is Loren M. Hoffman.

Direct Examination

Mr. Martin: Q. Mr. Hoffman, are you employed by the Southern Pacific Company? [136]

A. I am.

Q. And in what capacity, sir?

A. Assistant head timekeeper.

Q. Is that where the payroll records are kept, sir? A. Yes.

Q. And, Mr. Hoffman, did you examine the records pertaining to earnings of Mr. Arthur V. Heavingham during the year 1953? A. I did.

Q. And can you tell us, Mr. Hoffman, what the gross income was during that year?

A. $5,538.11.

Q. And will you tell us, please, what the net take-home pay was after payroll deductions?

Mr. Hepperle: One moment. May I, Your Honor, for the purpose of the record, make an objection?

The Court: You may.

Mr. Hepperle: This is objected to as not a proper

(Testimony of Loren M. Hoffman.)

method of proving earnings, or the lack of them. It injects a wholly collateral matter; it is incompetent, irrelevant, and immaterial for any purpose in the case.

The Court: The objection will be overruled.

Mr. Martin: Q. What was the net take-home pay, Mr. Hoffman? A. $4,493.13. [137]

The Court: May I have that again, Mr. Hoffman?

The Witness: $4,493.13.

Mr. Martin: You may cross-examine.

Mr. Hepperle: No cross-examination.

Mr. Martin: Thank you, Mr. Hoffman; that is all.

The defense rests, Your Honor.

Mr. Hepperle: The plaintiff rests, Your Honor.

The Court: Have you discussed the problem that we talked about before the adjournment, or before you left at noontime? What are your wishes now?

Mr. Hepperle: I didn't hear that last.

The Court: I say have you discussed the problem of arguments, to be specific?

Mr. Hepperle: Yes, my view is this, Your Honor: if it is all right with the Court and Counsel, I would just as soon argue this afternoon and begin as soon as it is convenient.

Mr. Martin: The only question in my mind is this, Your Honor: I would not like to, if we argue this afternoon, I wish all argument to be completed.

The Court: It will have to be completed this afternoon. I am not going to split any arguments.

Mr. Hepperle: I should like an hour, if I may have it, Your Honor.

The Court: All right, be an hour each side then, that [138] will be the limit, to one hour's argument, and I will give you a five-minute warning and a one-minute warning, and when I tell you that your time is up, I don't expect you to stop in the middle of a sentence, but I do expect your argument to stop as soon as you bring that point to a close.

You want to take a brief recess before we start the argument?

Mr. Hepperle: I think it would be a good idea.

The Court: Perhaps give you an opportunity to go over your notes.

We will take a brief recess at this time and then we will hear the arguments.

Ladies and gentlemen of the Jury, you will remember the admonition of the Court heretofore given.

(Recess.)

* * * * * [139]

Friday, February 4, 1955

The Court: The record may show the jurors are all present.

Ladies and Gentlemen of the Jury, it now becomes the duty of the Court to instruct as to the law governing your deliberations in this case. Upon all questions of law, it is your duty to be guided by the instructions of the Court and to accept the law as given to you by the Court. You are, however, the sole and exclusive judges of all questions of fact and the weight and effect of the evidence and of the

credibility of the witnesses. Your power of judging the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

You must not consider for any purpose any testimony which has, by order of the Court, been stricken out. Such testimony is to be treated as though you had never heard it.

You should disregard statements, if any, made by the attorneys not supported by the evidence. However, any facts stipulated to by counsel may be treated by you as facts proven in the case.

Sometimes, when the use of a pronoun is appropriate in an instruction, the masculine form only is used as a convenience in composition, although the instruction may refer and apply to the plaintiff or the defendant or a witness or [165] other persons who, in the case on trial, is a female person or a corporation. Whenever the masculine pronoun is so used, its reference embraces the female person or such a corporation, respectively, to the same effect as if the corresponding female or neuter pronoun were substituted.

The defendant in this case is a corporation, but that fact should in no way prejudice you in your deliberations or in your verdict. This case must be considered by the Jury the same as if it were an action between persons of equal standing in the community. The fact that one of the parties is a corporation should not affect or prejudice your minds in any way, but the rights of the parties should and must be determined upon the evidence

introduced in the case and the instructions given to the Jury by me.

These instructions which are given to you are the law and the only law to guide you in your deliberations.

In civil cases—and this is a civil case—the affirmative of issues must be proved by a preponderance of the evidence. The affirmative here is upon the plaintiff as to all of the affirmative allegations in his complaint which have not been admitted by the defendant, and upon the defendant as to any of the affirmative allegations of his answer. The burden of proof, therefore, rests upon the party making such affirmative allegations which are not admitted by the opposing party. If the evidence is contradictory, your decision must be [166] in accordance with the preponderance of the evidence. It is your duty, if possible, to reconcile such contradictions so as to make the evidence unveil the truth. When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it, has more convincing force and upon which it results of the greater probability is in favor of the party upon which the burden rests. Preponderance of evidence does not mean the greater number of witnesses, but the greater weight, probability, quality and convincing effect of the evidence and

proof offered by the party holding the affirmative as compared with the opposing evidence.

The Jury is the sole and exclusive judges of the effect and value of evidence addressed to it, and of the credibility of the witnesses who have testified in the case. There are some standards or rules by which you can measure the testimony of a witness and evaluate it and determine whether or not you want to believe it or how much of it you want to believe. The character of the witness, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and determining whether or not they have spoken [167] the truth. The Jury may scrutinize the manner of the witness while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, his interest in the case, if any, his bias or prejudice, if any, by the character of his testimony, or by contradictory evidence.

A witness may be impeached by contradictory evidence or by evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony as to any material matters to the cause on trial.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect,

if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The Jury may reject the whole of the testimony of a witness who has wilfully sworn falsely to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully with a design to deceive, then you may treat all of his testimony [168] with distrust and suspicion and reject all unless you shall be convinced that he has in other parts sworn to the truth.

You may also consider the manner in which a witness may be affected by the results of your verdict. You may also consider the extent to which he has been corroborated or contradicted by other evidence. Of course, any matter, in general, which you contend reasonably sheds light upon the credibility of the witness may be considered by you.

The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact in a case of the character of the one that you are now hearing. You are not bound to decide it in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number, or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean you are at liberty to disregard the testimony of the greater number of witnesses

merely from caprice or prejudice or from a desire to favor one side as against the other.

It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The testimony of each and every witness who has taken the witness stand in this [169] case must be considered fairly and weighed and judged by the same rules and tests to determine its weight and the credibility of the witness.

The plaintiff in this case is the personal representative of Arthur V. Heavingham, deceased, the plaintiff being the special administratrix of the estate of the deceased person. The plaintiff brings this action for the benefit of herself as the surviving widow of the deceased, and Kathleen Heavingham, the minor daughter of the deceased. These persons for whose benefit plaintiff acts are the real parties in interest and in that sense are the real plaintiffs. When later referred to in these instructions, I will refer to them as the beneficiaries of the action.

It is compensation for the pecuniary loss suffered by them which plaintiff is entitled to recover by this action.

The term negligence is used in the statute on which this action is predicated, and it will be used throughout these instructions, so it is essential that

you be given a definition of the term which I hope you will have no difficulty in understanding.

Negligence is the omission to do something which an ordinarily reasonably prudent person would have done under the same or similar circumstances, or is the doing of something which an ordinarily reasonably prudent person would not have done under the same or similar circumstances. It is not [170] absolute or intrinsic, but must always be determined by reference to the facts and circumstances existing at the time and not by reference to after-acquired knowledge.

Negligence can be an act of omission or an act of commission, and the standard is what the ordinarily reasonably prudent person would have done under the same or similar circumstances. Negligence may be active or passive in character, and in order to establish negligence, it is not incumbent upon the party who has the burden of proving the negligence to prove that the person to be charged with negligence intended to commit the injury of which complaint is made.

By her complaint in this case, the plaintiff seeks to recover damages sustained as the result of the death of the Arthur V. Heavingham. Many of the allegations in plaintiff's complaint are admitted by the defendant in its answer, or have been stipulated to be true during the course of the trial.

And insofar as these admitted or stipulated facts are concerned, you should treat them as being the established facts of this case.

By this agreement of the parties, these matters

have been agreed upon by them, to wit: The time and place of the accident, the fact that the deceased was at the time of his death employed as a head brakeman by the defendant, that the train was operated at the time of the accident in a careless [171] and negligent manner; that the deceased was killed in said accident, that the plaintiff has the legal capacity to bring this action, that Mary V. Heavingham is the surviving widow of the deceased and that Kathleen Heavingham is the minor surviving child of the deceased.

Actually, the issues for you to determine in this case are two-fold. First, you must determine whether the deceased was contributorily negligent. I will give you the law applicable to contributory negligence later in these instructions. Finally, as to the ultimate issue for your determination in this case, you must determine in dollars and cents the amount of damages that should be awarded to the plaintiff. Later in my instructions I will tell you how these damages should be calculated by you.

As I have told you, the defendant has conceded the existence of certain facts in this case. The mere conceding of these facts in itself should in no way prejudice you either for or against either of the parties, nor influence you in any way in determining the isuues which you are called upon to resolve in this case.

In the action that we are now trying, plaintiff seeks to prove and enforce a liability under the law of the United States Government commonly known as the Federal Employers Liability Act. This title

by which the act is generally known must not suggest to you that the law places an absolute [172] liability upon the defendant to respond in damages for every injury sustained by an employee while engaged upon the duties of his employment. Such an implication would be false. The title so used is merely a means of identification and you will look not to it but to the instructions of the court for the principles of law that must guide your deliberations.

The Federal law which concerns us in this trial provides that a common carrier by railroad, such as the defendant here, shall be liable in damages for the death of any employee who dies from injuries received while he was engaged in the duties of his employment if the injuries were the proximate cause of his death and such injuries resulted in whole or in part from the negligence of any of the officers or agents of the carrier or of any employee of such carrier, and not solely from the negligence of the one so injured. If all of the factors mentioned as creating such liability existed, the fact, if it was the fact, that the employee who thus came to his death was himself guilty of contributory negligence, shall not be a total bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The application of this rule will be explained to you later in my instructions.

As I have already told you, the defendant in this case has admitted that it was through its employees' negligence [173] that the accident in question oc-

curred and that such negligence was a proximate cause of the injuries which resulted in the death of the deceased. These admissions make the defendant liable in damages subject only to the reduction of the employee's contributory negligence, if any, and about which I will tell you later, although the carrier's negligence was not the sole proximate cause of the injury, and although the negligence of a third person, neither the employee nor the carrier, may have contributed in equal, greater or lesser degree in causing the injury.

I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under State laws to dispel from their minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the Court in those cases because in some respects the State and National laws conflict and in actions under the Federal Employers Liability Act, which proceed under National rather than State authority, you are bound to follow the instructions as now given to you by the Court which proceed under a National as distinguished from a State authority.

Some States, of which California is one, have statutes dealing with compensation to employees for injuries suffered in the course of and arising out of the course of their employment and which are insurance statutes, and where they [174] apply, provide for compensation for injury to an employee even though there is no fault or negligence on the part of the employer. I am referring to the Work-

men's Compensation provisions of the Labor Code of the State of California, and I point out that the statute is an insurance law and insofar as we are concerned here, negligence is of no importance in that statute. No State statute of that kind has any application to this case.

As I have already suggested to you, the effect of contributory negligence on the plaintiff's claim is different in a case brought under the Federal law here involved from what it is in the usual action for damages based on alleged negligence and brought under State laws. In the latter type of case wherein the State laws are controlling, contributory negligence by a person usually is a bar to any recovery by him. But in an action such as we are now trying here under the Federal law applicable, contributory negligence, if any existed, does not entirely bar recovery, but does require proportional reduction in the damages that otherwise would be recoverable.

I shall explain the application of this rule. A person is guilty of contributory negligence if he himself is negligent and his negligence concurring in any degree with the negligence of another or of others aids and proximately causing injury to himself. [175]

In considering the issue of contributory negligence the fundamental matter for you to consider is whether the deceased was guilty of any negligence which contributed in any degree as a proximate cause of the deceased's death. If you should find that the deceased was guilty of no such con-

tributory negligence, then under the admissions of the defendant in this case you must fix the amount of plaintiff's damages and return a verdict in her favor. If, however, you should find that the deceased was guilty of contributory negligence, as I have defined that term to you, you must follow the law and procedure for arriving at damages and diminishing the same in proportion to the amount of negligence attributable to the plaintiff in accordance with the instructions that I shall give on such matters.

For the purpose only of illustrating how to apply the law that requires a proportional reduction in damages in the event of a finding that both defendant and deceased employee were guilty of negligence which contributed as a proximate cause of the deceased's injury and death, let us assume that a jury in a case similar to this one has made such findings. Its first step would be to determine the amount of damages to which the plaintiff would be entitled under the Court's instructions if the factor of contributory negligence were not present and the other necessary elements of liability were present. Let us call the amount X dollars. The jury next [176] would be required to view as a combined effect the negligence of the defendant and the negligence of the deceased which were proximate causes of the injury. Then with that combined negligence in mind the jury would determine what portion of it in fraction or percentage consisted of the deceased employees' own conduct. If, in the jury's judgment, one half of such combined negli-

gence was the deceased employee's then it would award Plaintiff but one half of X dollars. If two thirds of such negligence was the deceased employee's, then the jury would award only one third of X dollars. If one third of such negligence was the deceased employee's, then the jury would award plaintiff two thirds of X dollars.

You will bear in mind that in giving you this illustration to be considered only in the event that you findings should make it appropriate, I do not mean to convey any suggestion whatsoever as to what your verdict should be in this case.

In this case if you should determine that the deceased was not guilty of contributory negligence, you will award plaintiff such sum as under all the circumstances of this case will be just compensation for the pecuniary loss suffered by the beneficiaries of the action, the names of whom I have previously given you, which loss has resulted and is reasonably certain to result from the death of the deceased. I will advise you how to measure this loss in just a few moments.

If you should determine that the deceased was guilty of contributory negligence, then before you diminish the damages [177] in proportion to the negligence attributable to him, as I have instructed you, you will arrive at the amount of damages to which plaintiff would have been entitled had it not been for such contributory negligence.

In determining the pecuniary loss to which I have referred, you may consider the age of the deceased

and of Mary V. Heavingham and Kathleen Heavingham, the beneficiaries of this action, the state of health of the deceased, and of each beneficiary as it existed at the time of the death and immediately prior thereto, their station in life, their respective expectancies of life, as shown by the evidence, the disposition of the deceased to contribute financially to the support and other advantages of the beneficiaries and his actual habits and practices in respect to the making or in making of such contributions, the ability of the deceased and his inclination to, and habit of performance, or in performing services having monetary value for any beneficiary, what the deceased was earning at the time of his death, what he customarily earned prior thereto, and within a time reasonably to be considered, what his earning capacity was, what his personal expenses and other charges and deductions against his earnings were, and such other facts shown by the evidence as throw light upon the question of what pecuniary benefits each beneficiary might reasonably have been expected to receive from the deceased had he lived beyond the date of [178] his death.

With respect to the matter of life expectancy, you will keep in mind that the prospective period of time that will be of concern to you in your effort to find the pecuniary loss of the beneficiary is the life expectancy of the deceased, since all of the evidence shows that the life expectancy of the deceased was less than that of either beneficiary.

The reason for this rule is obvious since one could

not derive financial benefit from the life of another for longer than while both are living.

You are not permitted to award plaintiff any sum as a balm to the feelings of either beneficiary, or for the grief or sorrow of such persons, or for the loss of society or companionship of the deceased, or for the loss of purely sentimental values that were attached to that society.

In respect to the child Kathleen, you will have in mind the duty of a parent to provide nurture and intellectual, moral and physical training for a child such that if it had been obtained from others it would require financial compensation. If the evidence shows fitness and inclination of the deceased parent to contribute these values to his child, or any of them, and that the child has been deprived of them by the death, that the pecuniary value of any such lost benefits would be a proper element of damages in this case.

It should, however, be kept in mind that a child's right [179] to contributions from her parents ceases when she marries or reaches the age of majority. Therefore, you should restrict this element of your award to the minority of Kathleen.

In determining the present value of any future benefits that you should find to have been lost by the death of the deceased, you will calculate on the basis that any sum you might award will be handled and invested with reasonable wisdom and frugality and that all of it, except as currently and reasonably needed, will be kept so invested as to yield the

highest rate of interest consistent with current interest rates and reasonable security.

The present value will be a sum which, when supplemented by such income from it, will equal the total of lost future benefits.

The measure of the pecuniary loss to which I have referred insofar as it relates to the future, and in the case of each beneficiary, is the present monetary value of the future benefits of which the beneficiary has been deprived by the death of the deceased, and which are capable of measurement by a pecuniary standard. To fix the present value of such future benefits requires that you deduct from the total of such benefits a proper allowance for the future earning power of whatever award you now may make in this case.

There is a further issue in respect to damages that you will determine in this case. If you should find that between the time of the injury and the time of the death there was [180] an appreciable period of time in which the deceased, not as a mere incident of death or substantially contemporaneous with it, but while he was conscious and as a proximate result of such injury suffered pain, discomfort, fear, anxiety and other physical, mental and emotional distress, you will arrive at an amount that will be just compensation for such pain and suffering. I shall refer to that sum as general damages.

If you find that the deceased was not guilty of contributory negligence, as I have heretofore defined that term for you, the amount of such general

damages may be included in your award to the plaintiff. If said deceased employee was guilty of contributory negligence, then the amount of such general damages shall be included in the figure representing the total sum of damages from which you are to deduct a portion because of such contributory negligence in regard with the instructions previously given.

The burden rests upon the plaintiff to prove by a preponderance of the evidence all of the elements of the damages claimed in her complaint. The mere fact that the accident happened, considered alone, would not support a verdict for any particular sum.

It is not necessary that any witness should have expressed an opinion as to the amount of damages, if any, that should be allowed for the conscious pain and suffering of the deceased, if any. In this regard the law prescribes no definite measure [181] of damages but leaves such damages to be fixed by you as your sound discretion shall dictate to the end that under all of the circumstances shown by the evidence your award in this regard is fair, just and proper.

According to the American experience table of mortality the life expectancy of a male aged 57 years is 16.05 years. The life expectancy of a female aged 49 years is 21.63 years, and the life expectancy of a female aged 10 years is 48.72 years. According to the United States life tables, the life expectancy of a male aged 57 years is 16.98 years. The life expectancy of a female aged 49 years is

25.54 years, and the life expectancy of a female aged 10 years is 60.85 years. These facts, of which the Court takes judicial notice, are now in evidence to be considered by you in arriving at the amount of damages that you may find that plaintiff is entitled to receive in this case. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining life of all such persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same [182] issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the amount of the prayer of such complaint asking for certain compensation is to be considered by you in arriving at your verdict except in one respect, that the amount of damages alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

In returning your verdict to the plaintiff it shall be a single sum representing the aggregate of the pecuniary loss suffered by the beneficiaries of this

action, whose damages must be found in accordance with my instructions to you.

In other words, you will not, in your verdict, allocate the damages between the beneficiaries of this action. Such allocation will, if necessary, be determined in other appropriate proceedings.

In fixing the amount of your award in this case you must not include any sum or enlarge an otherwise just award for the purpose of punishing defendant or to set an example. To include such a sum would be to award punitive rather than compensatory damages, and the law does not authorize punitive damages in this action. Your award must be compensatory only.

Both parties are equally entitled to your fair consideration and to the protection of your impartial judgment. Further, the law does not permit you to take into consideration the matter of court costs or attorneys' fees or such matters, as such matters are not submitted to you for determination and are of no concern whatsoever in this case.

The law absolutely forbids you to determine any issue in this case by resorting to chance. You will understand this principle of law better, perhaps, if I give you an illustration. The defendant has conceded that the plaintiff is entitled to recover some amount of damages in this case. Let us suppose that the jurors agree that each juror shall write down or state an amount of damages that he believes should be awarded, and all such amounts shall be totalled, the total divided by twelve to find the average, and that the average so found shall be agreed

by the jury in advance to be the amount of the verdict. To use such a method would be to determine the issue of damages by chance, and it would be unlawful and a violation of your oath as jurors.

It is your duty as jurors to consult with one another and determine with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I say that you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors and you should not hesitate to change an opinion when convinced it is erroneous. However, none of [184] you should vote in any manner nor be influenced in so voting for the simple reason that a majority of the jurors are in favor of a particular verdict. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors.

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relative to any of these matters, I instruct you to disregard it.

I think I have now given you as briefly as possi-

ble for me to do so under the circumstances the various rules and principles which are to govern you in your deliberations and in your determination of the factual questions which are yours for decision. If you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room and if after you have discussed the case between yourselves you are satisfied that your original view of the case was erroneous, I ask you not to [185] be stubborn and in that situation do not hesitate to change your views. However, if after a full exchange of views with your fellow jurors you still feel you are right, of course you should maintain your position and you should not surrender it merely for the purpose of arriving at a verdict or merely because a majority of the jurors have the opposite leaning.

Upon retiring to the jury room you will select one of your number to act as your foreman or forelady, who will preside over your deliberations and who will sign the verdict to which all of you agree. It will be the duty of the one so selected to serve as your spokesman in any further proceedings in this case, and the person selected to act as foreman or forelady should permit full and free discussion of the case by jurors in the jury room, and the other jurors should assist the foreman or forelady so selected to keeping the proceedings orderly and expediting the proceedings of the jury in the jury room.

If you desire to see any of the exhibits admitted

in evidence you may advise the Court Crier of that fact and the exhibits that you wish to see will be delivered to you in the jury room. If it should become necessary for you to communicate with the Court on any matter connected with the case while you are deliberating, I admonish you that you must not disclose to the Court how you stand numerically or otherwise, and this admonition you are to adhere to until the jury has reached a verdict. It will take all 12 of you to reach a verdict. When [186] all 12 of you have agreed on a verdict, that is the verdict of the jury.

There has been prepared for your convenience a blank form of verdict. This form of verdict has no significance in and of itself and is not to be considered by you for any purpose other than as a convenience for your use.

When you have reached your verdict, it must, as I have already told you, be unanimous. The foreman or forelady should fill in on the blank form the amount of damages agreed upon by you and sign the verdict form. You shall then return the same to the Court.

Has the plaintiff any exceptions or objections to the instructions at this time?

Mr. Hepperle: I have, Your Honor.

The Court: Does the defendant have any?

Mr. Martin: I have one, Your Honor.

The Court: Ladies and gentlemen of the jury, I will excuse you at this time while I discuss this question of law again with Counsel, see if we can

resolve it and at least enable them to protect their record in this case here, so you will be excused at this time. You will remember the admonition of the Court heretofore given.

(Whereupon at 10:39 a.m. the jury retires from the Court Room.)

The Court: The record may show the jury has gone out [187] of the hearing of the Court. Mr. Hepperle.

* * * * *

Mr. Martin: If Your Honor please, I would like to make [188] an exception on behalf of the defendant to the failure—to the giving of the Court's instructions going to the subject of conscious pain and suffering as an element of damage, and to the failure to give defense instruction, proposed instruction No. 9 which, in effect instructs the jury that there is no issue in this case on conscious pain and suffering, upon the grounds that under all the evidence in the case there was no such issue of fact to go to the jury on that question.

And I also will take exception, Your Honor, to the failure to give defense instruction No. 10 which further qualifies the life expectancy instructions in that it points out to the jury that a person will not necessarily work his full life expectancy.

The Court: Those exceptions will be noted in each instance. I may say to you gentlemen, though, that I told you yesterday noon that I considered

these things were, these matters to which you are now excepting, were just going to get us all in trouble in this case, and of course each of you wanted to put the monkey on my back, so I have to say what was to be done, so I am not going to do it. You have asked for a jury trial, you are going to get a jury trial in this case, and the time comes for me to pass my judgment on those two issues, I have to do so, but not at this time.

Return the jury to the Court Room.

(Whereupon the jury returns to the Court Room.) [189]

The Court: Members of the jury, you have now received all of the instructions that I shall give you in this case, and you may retire and deliberate upon your verdict. The form of verdict will be handed to you by the Crier in time for your deliberations. You may retire at this time.

(Whereupon at 10:45 a.m. the jury retires to deliberate.)

[Endorsed]: Filed April 25, 1955.

[Endorsed]: No. 14813. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Mary V. Heavingham, Special Administratrix of the Estate of Arthur V. Heavingham, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14813

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

vs.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased, Appellee.

APPELLANT'S STATEMENT OF POINTS

Agreeably to Rule 17, paragraph 6, of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely.

I.

The points upon which appellant intends to rely are as follows:

1. The trial court erred in instructing the jury that under the evidence they could award damages for conscious pain and suffering by the decedent because there was a complete failure of proof upon this issue.

2. The trial court erred in refusing to give defendant's proposed Instruction No. 9 to the effect that the jury could not include in their award any sum for claimed conscious pain and suffering by the decedent.

3. The verdict for $75,000 is excessive in that it is apparent from its magnitude that the giving of the instruction erroneously authorizing the jury to consider the issue of conscious pain and suffering by the decedent was prejudicial to the defendant.

Dated: July 18, 1955.

/s/ ARTHUR B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Appellant, Southern Pacific Company

Acknowledgment of Service attached.

[Endorsed]: Filed July 18, 1955. Paul P. O'Brien, Clerk.

No. 14,813

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

v.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,

Appellee.

Appellant's Brief

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division

Hon. SHERRILL HALBERT, Judge

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OTHER AUTHORITIES

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Appellant's Brief

Appeal from the Judgment of the United States District Court for the Northern District of California, Southern Division

Hon. SHERRILL HALBERT, Judge

STATEMENT OF JURISDICTION AND PROCEEDINGS

Plaintiff and appellee's decedent, Arthur V. Heavingham, while in the course of his employment as a brakeman for appellant, Southern Pacific Company, was killed on February 24, 1954, when the locomotive in which he was riding collided with a caboose attached to the rear of a standing train near Davis, Yolo County, California.

Appellee, the surviving widow and special administratrix of decedent, commenced this death action for $250,000 damages on March 5, 1954, on behalf of herself as the surviving widow and Kathleen Heavingham as the surviving minor child of decedent. She claimed under the Federal Employers' Liability Act, 45 USCA §51, et seq.

The jurisdiction of the Court below was sustained by §6 of the Federal Employers' Liability Act (45 USCA §56).

The case was tried by the Court, sitting with a jury, on February 2, 3 and 4, 1955. On February 4, 1955, the jury returned a verdict for plaintiff and appellee in the amount of $75,000 (R. 9).[1] Judgment on the verdict was entered February 7, 1955 (R. 10-11).

It was and is the appellant's position, both here and below, that the evidence was insufficient to create a jury question on the issue of conscious pain and suffering by decedent and that therefore the Court below was in error in submitting this issue to the jury over appellant's objection, and in refusing to give appellant's proposed instruction No. 9, withdrawing this element of damages from consideration by the jury. The instructions in question are set out in full under the heading "Specification of Errors" on pages 11-12 below.

On February 10, 1955, appellant served and filed its notice of motion for new trial (R. 11-13). The motion was heard on April 22, 1955, and was denied by order of the Court below on May 12, 1955 (R. 13-14). Thereupon, and within the time allowed by law, defendant, the appellant, perfected this appeal, by notice of appeal filed June 1, 1955 (R. 14).

The jurisdiction of this Court is sustained by 28 USC §§ 1291, 1294, 2107 and the Federal Rules of Civil Procedure, Rule 73.

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[1] The numbers in parentheses preceded by the letter "R" indicate pages in the printed record.

STATEMENT OF THE PLEADINGS

The complaint (R. 3-6) sets forth plaintiff's legal capacity to maintain the action as administratrix of decedent (this was stipulated to by defendant and appellant (R. 95)), the corporate existence of the defendant and the nature of its business as a common carrier by railroad in interstate commerce near the Station of Davis, County of Yolo, State of California. Paragraph IV of the complaint reads as follows:

> "This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 USCA Section 51, et seq."

The complaint alleges the time and place of the accident and the employee status of appellee's decedent followed by the allegation charging negligent operation of the train on which appellee's decedent was riding and of the stopped train against which it collided, and that appellee's decedent died as a proximate result of such negligence.

Paragraph VIII of the complaint alleges:

> "Between the time of said accident and injuries sustained by decedent and his death he was conscious and suffered excruciating pain and mental anguish, to plaintiff's damage herein in the sum of $50,000.00."

Paragraphs IX, X and XI of the complaint allege:

> "Plaintiff is the surviving widow of said decedent, and Kathleen Heavingham is the minor surviving child of said decedent.
>
> "Plaintiff and said minor child were entirely dependent upon the earnings of said decedent for their maintenance and support."
>
> "At the time of the death of decedent aforesaid, said decedent was a well and able-bodied man of the age of 56 years, and was earning and receiving from his employment with defendant a regular salary of approxi-

mately $600.00 per month, all of which he contributed to the support of plaintiff and said minor surviving child, Kathleen Heavingham."

"By reason of the facts hereinbefore set forth, plaintiff has been generally damaged in the sum of $200,000.00."

The answer (R. 7-9) admits the corporate existence of the defendant and that it was a carrier engaged in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California and in other states. It admits that at the time and place of the accident the decedent Arthur V. Heavingham was employed by it as head brakeman on a freight train being operated by it between stations at Suisun and Roseville, California, and that pursuant to his duties decedent was riding in the locomotive of said freight train. The answer further admits that the freight train upon which decedent was employed was carelessly and negligently operated into and against the rear of another freight train resulting in the death of decedent Arthur V. Heavingham. Appellant by its answer denied the other allegations of the complaint and set up the defense of contributory negligence on the part of appellee's decedent.

STATEMENT OF FACTS

A. The Accident

The only witness to testify regarding the accident in which appellee's decedent was killed was the fireman George E. Maasen. He testified as follows:

The accident occurred on February 24, 1954 (R. 23) at about 2:30 a.m. (R. 24) near Davis, California (R. 23). Appellee's decedent, Maasen and engineer Joe Cooper were the occupants in the cab of a mallet engine, which is of the cab ahead type (R. 23). This engine was pulling about 29 freight cars (R. 23).

The engine was equipped with three seat boxes, the engineer's, the fireman's and the brakeman's (R. 27-28). As the engine approached Davis, the engineer was operating the engine, looking out of the window ahead (R. 28). Appellee's decedent was seated on the brakeman's seat box which was located in the front of the engine, slightly to the left of the center of the cab (R. 27-28).

The weather was dark and foggy and visibility varied with the density of the fog (R. 30). Immediately before the accident visibility was limited to two or three car lengths, a car length being approximately fifty feet (R. 30).

The engineer, fireman and appellee's decedent were all calling out the block signals as they saw them (R. 29). This is done by all of the occupants of the cab of the engine as a cross check to insure accuracy (R. 50). The next to last signal that the engine passed was yellow (R. 30) which indicated that at that moment the next signal beyond was red (R. 69). A yellow signal is a caution signal to be prepared to stop before reaching the next home signal (R. 68). A red signal indicates that the area between that signal and the next one is occupied (R. 69).

Immediately before the collision the engineer had reduced speed by use of the engine brakes but had not applied the train brakes (R. 31). A red signal suddenly appeared out of the fog and the engineer immediately applied the train brakes in emergency which applied the brakes on every car in the train in order to bring the train to a stop as fast as possible (R. 31). As or very shortly after the red signal was observed fireman Maasen saw the red marker lights on each side of the caboose ahead (R. 31). As soon as appellee's decedent saw the marker lights, at a distance of about 2 car lengths, he got up from his seat box and walked over to the engineer's side. Fireman Maasen got up on his seat box,

with his back to the front of the engine to shut off the oil valve which would put out the fire in the engine. Appellee's decedent returned to Maasen's side and stood almost in front of him (R. 31-32).

Fireman Maasen was thrown out of the window of the engine by the impact (R. 32). His next recollection was when he was on his hands and knees opposite the engine across two sets of tracks (R. 33) about 20 to 25 feet from the engine (R. 61). The speed of the engine at impact was 12 to 15 miles per hour (R. 51).

Fireman Maasen described his activities following the accident as follows: (R. 33-35)

> "I looked back to see what had happened, and I still saw the fire flickering in the firebox, so I went back over to the tank, back over to the engine, and got on top of the tank and shut the oil valve off which put out the fire in the firebox.
>
> "Then I walked up the running board to the cab window on my side to try to get in there, and the steam was so hot I couldn't get near it. And I went back to what they call a monkey deck, I never heard it called anything else. It is a deck between the engine and the tank, and there's a ladder getting up to that—on each side.
>
> "I went back to the monkey deck, crawled up the ladder and went up the engineer's side, crawled up his ladder as far as the window, and the steam was so hot there I couldn't get near it. And I got back down and I saw somebody down there and he asked me something; he said something to me. I don't know what it was. I told him to give me a hand; I have got a fireman—a brakeman and an engineer in there in that cab, help me get them out.
>
> "He said, 'Well, I am the engineer.' Of course, I had never seen the man with his hat and glasses off, and it was dark, too, so I a good close look at him (*sic*)

and I said, 'I am sure you got out, Joe.' So I said—he asked me is the brakeman in there. 'I guess he is in there, I don't know, I haven't seen him.'

"So I went around my side again and tried to get in the ventilator, which is just above the cab, and the steam there was boiling out. Then I thought of the blow-down valve which releases the steam from the boiler. So I walked along the top of the engine at the other end and I opened that and I got back down on the ground. And that is all I could do.

"I couldn't—I tried to get in the cab on each side again and I couldn't get in, couldn't get up in front of the window.

"So by that time I met the conductor and evidently he had called the ambulance—I don't know who called him or when, but I heard the siren of the ambulance and you couldn't see the highway it was so foggy.

"So then the ambulance drivers came over and we started back to the ambulance. The ambulance drivers and the conductor helped the engineer and I over. And I happened to hear the steam quit blowing so I told them, 'I am going back and look in that cab.'

"They said, 'No, come over to the ambulance.'

"I said, 'No, I am going back and look in the cab.' So I went back and got up on the running board on my side, walked up to the window again, and in the meantime, on my way back alongside the engine a brakeman handed me a fusee. Mr. Hepperle explained what the fusee is. That was the only light I had, so I lit that and looked in the window when I got up there and I saw Mr. Heavingham. I didn't know whether—I wasn't sure whether he was dead or not, but I got down, I went back to the engineer and I said, 'Well, Art's gone.' That was Mr. Heavingham's name, that is what we called him.

"He said 'What do you mean? Did he—isn't he in there?'

"I said, 'Yes.' I said, 'That isn't what I mean.' I said, 'Art's dead.'

"So we went back to the ambulance and I stood in the open door leaning against the front seat and told the conductor to take his light and show the ambulance driver how to get up to the cab. He didn't know the ladder was gone on my side. So I told him he would have to walk up the running board and take the ambulance driver and show them how to get up there and take a look at Art, I said, and make sure before we leave. So he did. And he came back, one of the ambulance drivers —I asked him, 'How did you find him?'

"He said, 'He never knew what hit him.'

"And they put me on the stretcher, put me in the ambulance and went to Sacramento."

He also testified: (R. 56)

"Q. Now, during the time that you were at or about the locomotive following this accident, Mr. Maasen, you at no time heard any outcry from the cab of the locomotive, is that correct?

"A. No, sir.

"Q. Or any sound of a human voice of any kind?

"A. No, sir."

Appellee introduced in evidence over objection of appellant a certified copy of death record (Plaintiff's Exhibit No. 26, R. 121) prepared by the Yolo County Health Department which states, inter alia:

"1a-I Disease or condition directly leading to death scalding burns over entire body when locomotive in which he rode crashed into another train.

"2A Date of death February 24, 1954. 2b Hour 2:30 a. m.

"22D Time of injury 2-24-54 2:30 a. m."

B. Damages from Loss of Financial Contributions

Appellee's decedent, Arthur V. Heavingham, was born on June 4, 1897 (R. 96) and consequently was slightly over 56 years and 8 months of age when he died on February 24, 1954. His widow and appellee, Mary V. Heavingham, was born on January 9, 1905, being slightly over 49 years of age at the time of decedent's death. The minor child, Kathleen Heavingham, was born on February 12, 1944, and was slightly over 10 years of age at decedent's death. (R. 96)

The life expectancy of a male aged 57 according to the American Experience Mortality Table is 16.05 years, and according to the United States Life Table is 16.98 years. The life expectancy of a female aged 49 under the above tables is respectively 21.63 years and 25.54 years. Under the same tables the life expectancy of a female aged 10 years is respectively 48.73 years and 60.85 years. (R. 71-72)

It was stipulated that during the year 1952 appellee's decedent earned $5,722.01 before payroll deductions, and in 1953 he similarly earned $5,574.34 (R. 94). For the calendar year 1953 decedent's net take home pay after payroll deductions was $4,493.13 according to the accounting records of appellant (R. 133). This figure approximates $375.00 per month.

Appellee's decedent was a trainman (R. 129). As of the middle of December, 1954, there were 4,090 trainmen in appellant's employment, 18 of whom were over age 70 (R. 130). In order to qualify for work over age 70 special restrictions upon trainmen must be met. They must undergo special physical examinations every three months and must have the recommendation of the superintendent that they are properly performing their duties and are alert and able to get up and down on the trains. (R. 130-131)

The average age of voluntary retirement of trainmen is between ages 66 and 67 (R. 131).

Decedent's duties frequently took him away from home (R. 106). The job which he held at the time of his death required that he be based in Roseville and be away from home five days a week. Whenever decedent's job required him to be away from home he lived at a hotel and took his meals wherever he was (R. 106-107). Appellee testified she did not believe decedent's personal expenses amounted to $100.00 per month (R. 108).

Appellee's actuary, Robert R. Drisko, testified concerning various formulae for computing the present value of decedent's future contributions to his dependents. These may be summarized as follows:

The cost of an annuity purchased from a private life insurance company (The Metropolitan Life Insurance Company) to provide $10.00 per month for the full life expectancy of a male aged 56 is $2,148.18 (R. 72-73, 82). To use this formula the desired monthly sum is divided by ten and the quotient is then multiplied by $2,148.18 (R. 82-83).

The present value[2] at 2½% interest to provide one dollar per month for the full life expectancy (16.05 years) of a male aged 57 is $158.65. At 3% interest the figure is $153.16 (R. 83-85). To use this method of computing present value one simply multiplies the desired monthly income by the amount in dollars for the desired interest rate, e.g., to provide an income of $100 per month for 16.05 years at 3% interest, the formula is 100 × 153.16, or $15,316.00 (R. 84).

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[2] "Present value" was defined by the actuary as "the sum of money, which if invested or deposited in a trust or bank would be just sufficient to provide monthly payments for the period stated, provided that the interest on the balance in the account was credited each year at the rate shown, and at the end of that period both principal and interest would be exhausted. (R. 83-84)

Factors to compute the present value of future income are available in a table called "Present Value of Annuity." By selecting the factor for the appropriate number of years and interest rate and multiplying the desired annual income thereby we arrive at the present value of such an annual income. The following is a table of factors to ascertain the present value of an annual income for from 8 to 13 years at rates of interest of 3%, 4% and 5% (R. 88-90).

Years	Factor at 3%	Factor at 4%	Factor at 5%
8	7.019	6.732	6.463
9	7.786	7.435	7.107
10	8.530	8.110	7.721
11	9.252	8.760	8.306
12	9.954	9.385	8.864
13	10.634	9.985	9.393

SPECIFICATION OF ERRORS

The errors which appellant specifies and upon which appellant relies as grounds for reversal are as follows:

1. The District Court erred in giving the following instruction to the jury:

> "There is a further issue in respect to damages that you will determine in this case. If you should find that between the time of the injury and the time of the death there was [180] an appreciable period of time in which the deceased, not as a mere incident of death or substantially contemporaneous with it, but while he was conscious and as a proximate result of such injury suffered pain, discomfort, fear, anxiety and other physical, mental and emotional distress, you will arrive at an amount that will be just compensation for such pain and suffering. I shall refer to that sum as general damages." (R. 149)

2. The District Court erred in refusing appellant's request to instruct the jury as follows:

"Defense Instruction No. 9.

"I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent." (R. 19-20)

Appellant duly excepted to both of the errors above specified as follows:

"Mr. Martin: If Your Honor please, I would like to make an exception on behalf of the defendant to the failure—to the giving of the Court's instructions going to the subject of conscious pain and suffering as an element of damage, and to the failure to give defense instruction, proposed instruction No. 9 which, in effect instructs the jury that there is no issue in this case on conscious pain and suffering, upon the grounds that under all the evidence in the case there was no such issue of fact to go to the jury on that question." (R. 156)

SUMMARY OF ARGUMENT

The general verdict of $75,000 undoubtedly included a substantial award for conscious pain and suffering of the decedent. This fact is apparent from a comparison of the total verdict with the range of amounts that the jury could, under the evidence, have awarded for the only objectively measurable element of damages, namely, the present cash value of financial contributions which the decedent would have made to his dependents, had he lived. Yet there is a complete lack in the record of any evidence sufficient to support any award whatsoever for conscious pain and suffering. Therefore the District Court committed reversible error in instructing the jury, over appellant's objection, that it might make such an award, and the District Court also committed reversible error in refusing to give the jury the instruction requested by appellant that the jury should not award any sum for conscious pain and suffering. An error in instructions to the

jury requires reversal unless it affirmatively appears that such error was harmless. Such an affirmative showing cannot be made here because the verdict could have included a substantial sum for the unsupported element of damages.

I.

THE VERDICT OF THE JURY WAS SO LARGE THAT IT UNDOUBTEDLY INCLUDED DAMAGES FOR CONSCIOUS PAIN AND SUFFERING BY DECEDENT

The possible causes of action provided by the Federal Employers' Liability Act (hereinafter referred to as the FELA) for the death of a railroad employee are found in two separate sections of the Act, §1 (45 USCA §51), enacted as part of the original Act on April 22, 1908, and §9 (45 USCA §59) added to the Act by amendment on April 5, 1910. Section 1 (45 USCA §51) provides, in the part pertinent here:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her own personal representative, for the benefit of the surviving widow . . . and children of such employee . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . "

Section 9 (45 USCA §59), added later, provides:

> "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow . . . and children of such employee . . . but in such cases there shall be only one recovery for the same injury."

In the leading case of *St. Louis, Iron Mountain & Southern Railway Company v. Craft,* 237 US 648, 59 L ed 1160 (1914) the Supreme Court of the United States declared and demonstrated that these sections provide two separate and distinct possible causes of action for the death of a railroad employee. The cause of action provided by §1 (45 USCA §51) is an action only for damages suffered by the designated members of the decedent's family, consisting of "compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." (*Chesapeake & O. R. Co. v. Kelly,* 241 US 485, 36 S. Ct. 630, 60 L ed. 1117, 1122; *Michigan C. R. Co. v. Vreeland,* 227 US 59, 33 S. Ct. 192, 57 L ed. 417.) This cause of action for pecuniary loss arises at the time of death. (*Dusek v. Pennsylvania Railroad,* 68 F2d 131 (Circ. 7, 1933).) It was not until the Congress added §9 (45 USCA §59), two years after the enactment of the original Act, that the persons who had previously been given possible rights of action for the damage suffered by **survivors** from the **death** of the employee under §1 (45 USCA §51) were given an additional and distinct right to recover, upon proper showing, for the loss and suffering incurred **by the employee himself** between the time of his injury and the time of his death. (*St. Louis, Iron Mountain and Southern Railway Co. v. Craft,* 237 US at 656-658, 59 L ed at 1163-1164.)

In the present action the jury returned a general verdict of $75,000 under instructions which authorized them to award damages for pecuniary loss to appellee and her daughter, under §1 (45 USCA §51), and also (we think erroneously) to award damages for conscious pain and suffering claimed to have been incurred by the decedent between the time of his injury and the time of his death, under §9 (45 USCA §59). In this part of our argument we shall

show that the erroneous instruction given, and the erroneous refusal to give appellant's requested instruction, on the issue of conscious pain and suffering undoubtedly increased the size of the verdict. We shall make this showing by examining the range of amounts which the jury could, under the evidence, have awarded for the only tangible, or objectively measurable, element of damages authorized by the instructions of the court,—namely, the present cash value of financial contributions which the decedent would have made to his dependents. The difference between even the highest conceivable award for this tangible element and the total verdict is large enough that it **could** include an award for conscious pain and suffering. The difference between the total verdict and the range of amounts most reasonably supported by the evidence for this tangible element, is such that it very probably **did** include an award for conscious pain and suffering.

Necessarily, any financial contributions made by decedent to his dependents would have to come from his net take-home pay after deductions. *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,* 191 F 2d 302, 310-311, (Circ. 7, 1951). Decedent's take-home pay was slightly less than $4,500 per year or $375.00 per month during the calendar year 1953, the last full calendar year of his life. (R. 133) This was the income from which appellee and the surviving minor daughter, Kathleen, would have to receive their financial contributions from the decedent.

Whatever part of his earnings were used by decedent purely for his own maintenance would not, of course, be available to his dependents by way of contributions for their support and maintenance. Simply taking decedent's income, deducting his personal expenses and capitalizing the balance has been held error. (*Kansas City etc. Co. v. Leslie,*

238 US 599, 604, 59 L ed. 1478, 1483.) It is to be presumed that decedent himself would derive some benefits from his earnings over and above his own strictly personal expenses.

This record shows that decedent was frequently away from home in the course of his duties during which times he lived away from home and took all his meals away from home. (R 106-107) Appellee testified that she did not believe that the money which decedent took out of the family funds "for his own personal expenses such as meals, clothing, and that type of thing," amounted to $100.00 per month (R. 107-108). This figure seems very conservative in view of the well known present cost of living and the depreciated value of the dollar.

Under the formula provided by the actuary (R. 72-73, 82-83), the purchase of an annuity from the Metropolitan Life Insurance Company which would provide decedent's beneficiaries with an income of $275.00 per month during his entire life expectancy (16.05 years by one table, and 16.98 years by the other), i.e., until decedent would have reached age 72 or 73, would cost $59,974.95. We submit that this figure represents the highest possible limit of any conceivable loss of financial contributions by decedent's dependents.

Use of the figure of $275.00, out of a total take-home pay of approximately $375.00, as the monthly financial contribution of decedent carries with it the assumption that his own personal expenses, plus the portion of his family household expense which inured solely to his own benefit, amounted to only $100.00 per month. This calculation also carries with it the unlikely assumption that decedent would have worked until he reached his full life expectancy of 72 or 73 years of age, where in fact, the evidence showed that the average age of retirement of trainmen such as decedent

is between ages 66 and 67, and that only 4/10ths of 1% of trainmen work beyond age 70. (R. 130-131). This formula also disregards the fact that the minor child, Kathleen, would have reached her majority eleven years after decedent's death, or when decedent reached age 67. (R. 96). Of course, where a beneficiary is a minor child the period of minority is taken to limit the period during which, at least in the absence of some peculiar circumstance (and there was proof of none in this case), expectation of pecuniary benefits exists. (*Chicago etc. Co. v. Kelley,* 74 F 2d 80, (Circ. 8).)

Using the same formula discussed above, and considering that decedent's contributions to his beneficiaries amounted to ½ of his take-home pay, which in the absence of any other showing was the figure adopted by the Court in *Sabine Towing Co. v. Brennan,* 85 F 2d 478, 482 (Circ. 5) we arrive at a figure of $40,278.37 as the present value of future contributions. Under either of these assumptions, or the assumption of any intermediate figure between them, it is apparent that the award of $75,000.00 must include a substantial amount for elements of damage other than the contributions of decedent to his beneficiaries.

Using the factors supplied by the actuary and for purposes of clarity and convenience we have set forth in a table as an appendix hereto, the present value of 3 annual sums of money, $2400.00, $3000.00 and $3600.00, discounted at rates of 3%, 4% and 5% for expectancies of from 8 to 13 years, that is, for periods covering decedent's age from 64 years 8 months to 69 years 8 months. Examination of this table will show amounts representing the present value of a decedent's future contributions ranging from $15,511.00 which represents the present value of an annual income of $2400.00 at 5% interest for 8 years or until decedent would have reached age 64 years 8 months, to $38,282.00 which represents the present value of an annual sum of $3600.00 at

3% for a period of 13 years, or until decedent would have reached the age of 69 years 8 months.

Using the method of computation last referred to, even if we accept the largest of the sums thereunder, this would still allow $36,718.00 for elements of damages other than financial contributions of decedent to his beneficiaries.

As a matter of interest, the present value of $2400.00 a year for 16 years (decedent's full life expectancy) at 3% is $30,146.00; $3000.00 a year for the same period at the same interest is $37,683.00; and $3600.00 a year for the same period and at the same rate of interest is $45,219.00.

The net effect of all of these calculations is that the jury in awarding $75,000.00 as damages herein obviously made the allowance for elements other than decedent's financial contributions to his beneficiaries, and it cannot be said that they did not allow a substantial sum for the element of conscious pain and suffering, which under the evidence was not a proper issue of damages for consideration by the jury.

II.

APPELLEE FAILED TO SUPPORT HER CLAIM FOR DECEDENT'S CONSCIOUS PAIN AND SUFFERING BY THE NECESSARY PROOF OF A SUBSTANTIAL PERIOD OF CONSCIOUSNESS AND SUFFERING BETWEEN INJURY AND DEATH

The proof required to support a recovery for conscious pain and suffering of a deceased railroad employee under §9 of the FELA (45 USCA §59) was authoritatively defined by the United States Supreme Court in *St. Louis, Iron Mountain and Southern Railway Co. v. Craft,* 237 US 648, 59 L ed 1160 (1914). In that case, the railroad company, plaintiff in error, challenged the sufficiency of the evidence to support an award, made in the state courts below, for the conscious pain and suffering of the decedent between

the time of injury and his death. The Court found support for this award in evidence that the decedent survived for more than a half hour injuries which would cause extreme pain and suffering if he remained conscious, and that during this period of survival he was "groaning every once in a while" and "would raise his arm" and "try to pull himself." After stating that this evidence was sufficient, however, the Court felt constrained to add this comment:

> "But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." 237 US at 655, 59 L ed at 1162.

The Court then cited *The Corsair (Barton v. Brown),* 145 US 335, 36 L ed 727 (1892). There a claim was made for the suffering prior to death of one Ella Barton, who was a passenger on a tug. It was alleged that from the time the tug struck the bank of the river to the time she sank, about ten minutes, and Ella Barton was drowned, the deceased suffered great mental and physical pains and shock and endured the tortures and agonies of death. These averments were held insufficient to show suffering which was "not substantially contemporaneous with her death and inseparable as a matter of law from it."

The rule of the *Craft Case* that to recover for conscious pain and suffering of a decedent under §9 of the FELA (45 USCA §59) plaintiff must affirmatively prove a substantial period, not merely contemporaneous with death, of (1) continuation of life, (2) injuries conducive to suffer-

ing and (3) continuation of consciousness, has been applied particularly in recent death cases under the Jones Act, 46 USCA §688, which grants the same rights of action for injury to or death of seamen as are granted by the FELA in the case of railroad employees. Thus in *Stark v. American Dredging Company,* 66 F Supp 296 (E. D. Pa. 1946), there was held to be no right of recovery for any conscious pain or suffering of a seaman who was thrown into the water when a rowboat capsized and was not seen alive thereafter but whose body was recovered from the water about a half hour later.

Similarly in *Smith v. United States,* 121 F Supp 778 (S. D. Tex. 1953), aff'd sub. nom. *United States v. Smith,* 220 F 2d 548 (Circ. 5, 1955) recovery was denied under the Jones Act for the alleged pain and suffering of a seaman who fell into the water from the side of a ship striking a dock on the way down. The Court said of the claim for pain and suffering, 121 F Supp at 784-785:

> "The record shows that Smith is dead as a result of his fall with the ladder. But **it would be a mere guess** to say when he died, or whether his death was caused from striking the dock or drowning or both. If the time of his death was known and shown, there would I take it be both mental and physical suffering by him from the time he began to fall until his death. But as the record stands, **the only certain period of mental and physical suffering** is from the time he began to fall until he struck the dock, and the amount of damages, if any, recoverable therefor would be a mere guess. I do not think Libellant, under this record, is entitled to recover therefor." [Emphasis supplied.]

The Court clearly recognizes, in the foregoing language, that it could allow recovery only for a "certain" period of suffering and could not allow anything for any period as to which suffering would have been a "mere guess." The Sixth

Circuit Court of Appeals applied the same principle in *Cleveland Tankers Inc. v. Tierney,* 169 F 2d 622 (1948) in which it denied recovery for claimed pain and suffering of seamen of the crew of a barge which was lost, with the entire crew, in a storm on Lake Erie. The Court said, 169 F 2d at 626:

> "The record is devoid of evidence from which a Court could determine that the various decedents endured pain and suffering before they died."

The statement last quoted is precisely applicable to the record now before this Court. The record shows that the decedent was standing in a locomotive cab in which there occurred an impact strong enough to throw another occupant of the cab, fireman Maasen, out the window; that immediately thereafter the cab was filled with steam so thick and so hot that Maasen, an experienced railroad man, could not penetrate into the cab; and that when the steam was cleared away, the decedent was found dead inside the cab. (R. 31-35)

There is absolutely no evidence of decedent's condition between the time of impact and the final gaining of access to the decedent's body. The surrounding circumstances, like the surrounding circumstances in the drowning cases cited above, all point to an extremely brief, or non-existent period of consciousness following the injury, certainly not one of any substantial duration. Even conceding, arguendo, some sort of artificial presumption of a continuation of life, there is certainly no room for any presumption, or even inference, that the decedent remained **conscious** for any appreciable time after the impact.[3] It is of course well settled that there

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[3] The only one present at the scene of the accident who appears to have expressed any opinion as to whether any period of consciousness followed the impact of the locomotive and caboose, was the ambulance driver, who said, "He never knew what hit him." (R. 35).

is no right under the FELA to recover for pain and suffering of a decedent who remained unconscious during the time that he survived his injury. (*New Orleans and N. E. R. Co. v. Harris,* 247 US 367, 62 L ed 1167 (1918); *Great Northern Railway v. Capital Trust Co.,* 242 US 144, 61 L ed 208 (1916).)

Appellee introduced into evidence, over the strenuous objection of appellant, a document pertaining to decedent entitled "Certified Copy of Death Record." (R. 121) Appellee's stated purpose in introducing this document was to put before the jury the statement therein that the cause of the decedent's death was "scalding burns over entire body when locomotive in which he rode crashed into another train." (R. 112) Appellant objected to this evidence as without probative value because of a complete lack of any independent evidence of survival beyond the time of impact. (R. 110, 114) We think that the admission of this evidence over this objection was error, though we do not specify such error as ground for reversal. But even if any conscious pain or suffering could properly be inferred, which we do not concede, from the phrase in the death record, "scalding burns over entire body," any such inference would be completely nullified by entries in the very same death record fixing the date and hour of death and the date and hour of injury **both** at 2:30 a. m. on February 24, 1954. The document would thus fall within the established rule that evidence which is both consistent with the existence of an element of damage and also consistent with its non-existence tends to establish neither. (*May Department Stores Co. v. Bell,* 61 F 2d 830, 842 (Circ. 8, 1932).)

In the first part of our argument (pp. 13-18, supra) we demonstrated that the verdict in this case was of such magnitude that the jury could have, and very probably did,

include in its award a substantial sum for conscious pain and suffering. The authorities discussed in this, the second part of our argument, when applied to all the evidence in the record conceivably relevant to possible conscious pain and suffering by the decedent, show a complete lack of legally sufficient evidence to meet appellee's burden of proof on this issue. It remains to demonstrate that under these circumstances, the giving of the instruction specifically authorizing the jury to include this element of damage in its award, and the refusal to instruct the jury that it should not consider this element, all excepted to by appellant, constituted error prejudicial to appellant and require that the judgment below be reversed and the case remanded for a new trial.

III.

AUTHORIZING THE JURY TO CONSIDER CONSCIOUS PAIN AND SUFFERING WAS REVERSIBLE ERROR

Under the federal cases it is reversible error to submit to the jury an element of damages not supported by material evidence.

May Department Stores v. Bell, 61 F 2d 830 (Circ. 8, 1932), was a personal injury case in which the plaintiff claimed as one element of damage a tubercular condition alleged to have been induced by lowered bodily resistance brought about by injury of the plaintiff's foot and ankle in defendant's escalator. The trial court had instructed the jury that it could consider plaintiff's tubercular condition in awarding damages. The Eighth Circuit Court of Appeals held that the evidence of any causal connection between the injury and the tubercular condition was speculative and insufficient and, upon the sole ground of error in submitting this element of damage to the jury, reversed the judgment

and remanded the case for a new trial on the issue of damages.

The same court, in the earlier case of *Chicago M. & St. P. Ry. v. Holverson,* 264 Fed 597, held it reversible error to authorize the jury to include in a personal injury award damages for a particular alleged injury not supported by sufficient evidence.

This Court, in *Union Oil Co. of California v. Hunt,* 111 F2d 269, reversed a judgment awarding damages for personal injury on a closely similar ground. In that case there was put before the jury evidence of pain and suffering arising out of an injury incurred prior to the injury being sued upon, and the Court gave instructions which could easily be construed as authorizing an award of damages for pain and suffering from the prior injury. In reversing on this ground, this Court quoted language from 15 Am. Jur. 410, "Damages," §20, which is very pertinent here:

> "The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed."

This Court, sitting in bank in *Southern Pacific Company v. Guthrie,* 186 F 2d 926 (Circ. 9, 1951), cert. den. 341 US 904, 95 L ed 1343, undertook a comprehensive review of the power of a federal appellate court to modify a judgment based on a verdict for damages for personal injuries on account of excessiveness of the amount of the award. In the course of its discussion the Court made the following preliminary observation, pertinent here: (186 F 2d at 926).

> "We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for **items of claimed damage of which no evi-**

> **dence whatever was produced.** Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case. There is no such want of evidence here." [Emphasis supplied.]

In the first part of our argument (pp. 13-18, supra) we demonstrated that in all probability the jury included in its verdict an amount for an "item of claimed damages of which no evidence whatever was produced," i.e., conscious pain and suffering. Under no view of this case can it be said that the jury did *not* make a substantial award for this unsupported item. It is the established rule of the federal appellate courts, well settled by a long line of cases, that where, over the defendant's objection, there have been submitted to the jury two or more possible alternative grounds on which it can base a verdict for the plaintiff, and one or more of those grounds is not sufficiently supported by evidence, a judgment for plaintiff must be reversed. The reason given for this rule by the Courts is that obviously the Court has no way of knowing whether the verdict was based on the proper ground or on the erroneous ground, and because it may have been based on the erroneous ground the judgment based on such verdict must be reversed.

The leading case in the United States Supreme Court applying this rule is *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed 708 (1907). That was a wrongful death action in which eight counts of negligence were pleaded. It was held that the trial court had committed error in overruling the motions of the defendant to strike the second, third and sixth counts of negligence and in refusing the

defendant's request to instruct the jury that there was not sufficient evidence to support a recovery on those counts. The Court further stated that it was impossible to say that this error was not prejudicial and the judgment below for plaintiff was reversed on that ground.

Decisions reversing judgments on verdicts for plaintiffs on the ground that one or more, but less than all, of the alternative bases of liability submitted to the jury lacked sufficient evidentiary support, have been found in the United States Courts of Appeal for the following circuits:

Second Circuit: *Christian v. Boston and Maine Railroad,* 109 F 2d 103 (FELA death action); *Erie Railroad Co. v. Gallagher,* 255 Fed 814 (FELA action).

Fourth Circuit: *Baltimore & Ohio Railroad Co. v. Deneen,* 161 F 2d 674, subsequent judgment affirmed, 167 F 2d 799; *Atlantic Coast Line v. Tiller,* 142 F 2d 718, rev'd on other grounds, 323 US 574, 89 L ed 465 (FELA action).

Sixth Circuit: *Detroit, T. and I. Railroad v. Banning,* 173 F 2d 752, 755, cert. den., 338 US 815, 94 L ed 493 (FELA action); *Pennsylvania Railroad Co. v. Stegaman,* 22 F 2d 69; *Baltimore & Ohio Railroad Co. v. Reeves,* 10 F 2d 329 (characterizing this rule as "the established federal rule"); *Buckeye Cotton Oil Co. v. Sloan,* 250 Fed. 712, 722, subsequent judgment rev'd 272 Fed. 615. The language in *Pennsylvania Railroad v. Stegaman,* supra, decided in the Sixth Circuit in 1927, indicates how strictly the rule is to be applied. The Court, after having found substantial evidence to support the first of three grounds of negligence submitted to the jury as basis for liability, declared in 22 F 2d at 70:

> "It is more or less probable, perhaps very likely, that the jury would have found negligence upon the first ground stated, if neither of the others had been

submitted; but they might not. Their conclusion may be based upon either the second or the third ground; and, if there was error in submitting either of these, there must be a reversal. We are compelled to find that there was error in both respects."

Eighth Circuit: *Chicago & Northwestern Railway Co. v. Garwood,* 167 F 2d 848 (FELA action); *Roth v. Swanson,* 145 F 2d 262, 269; *Chicago St. P., M. and O. Railway v. Kroloff,* 217 Fed. 525.

In several of the above cases, as well as in *Wilmington Star Mining Co. v. Fulton,* supra, itself, the reversible error consisted not merely in submitting particular unproven grounds of liability to the jury, but in refusing specific instructions to the jury that they should **not** consider certain unsupported grounds of liability. (*Baltimore and Ohio Railroad v. Deneen,* 161 F 2d 674 (Circ. 4, 1947); *Erie Railroad v. Gallagher,* 255 Fed. 814 (Circ. 2, 1918); *Buckeye Cotton Oil Co. v. Sloan,* 250 Fed. 712, 722 (Circ. 6, 1918); *cf. Chicago and Northwestern Railway v. Garwood,* 167 F 2d 848 (Circ. 8, 1948); *Chicago St. P., M. and O. Railway v. Kroloff,* 217 Fed. 525 (Circ. 8, 1914).) On the same principle, it was reversible error in the case at bar to refuse appellant's requested instruction that the jury should not include any sum for conscious pain and suffering in an award of damages to appellee. (R. 20) Such an affirmative instruction is necessary for the guidance of the jury where the jury's attention has been called to the possibility of such an element of damage, as in this case where appellee attempted to inject the issue of conscious pain and suffering through the introduction of the death certificate. (R. 121)

The rule of *Wilmington Star Mining Co. v. Fulton,* supra, applied in these various cases, from the Second, Fourth, Sixth and Eighth Circuit, has also been recognized in the

First Circuit and in our own Ninth Circuit, although no case has been found in the latter two circuits in which the Courts had occasion to apply the rule to reverse a judgment. In *Parker v. Gordon,* 178 F 2d 888, 895 (Circ. 1, 1949), the Court cited the rule, but found that both the alternative grounds of liability had been properly submitted to the jury and therefore affirmed the judgment below. In the first opinion in *Southern Pacific Company v. Guthrie,* 180 F 2d 295, 297, this Court stated the argument of the appellant in that case that either or both of the two charges of negligence submitted to the jury was unsupported by evidence, and that if either of the two claims was unsupported by evidence, the judgment must be reversed for the reason stated in *Wilmington Star Mining Co. v. Fulton,* supra, since it cannot be known on what ground the jury returned its general verdict for plaintiff. The opinion of the Court then proceeded to examine both charges of negligence and to find both supported by evidence in the record, an examination that would have been unnecessary if the Court had felt that evidentiary support merely of either one of the charges was sufficient to sustain the judgment for plaintiff.

In *Southern Pacific Company v. Kauffman,* 50 F 2d 159, this Court stated that if the appellant (defendant below) had made a motion or requested an instruction to withdraw a particular count of negligence, not supported by the evidence, from the jury, such a motion or request should have been granted (citing *Wilmington Star Mining Co. v. Fulton,* supra), but that such a motion or request had not been made. However, the Court also found error in excluding, over appellant's objection, certain evidence which would tend to counteract the charge of negligence erroneously submitted to the jury, and held that since the charge of negligence had in fact been submitted without supporting

evidence, the exclusion of appellant's evidence counteracting the charge was prejudicial as well as erroneous.

The only federal appellate case found contrary to *Wilmington Star Mining Co. v. Fulton,* supra, that is, refusing to reverse a judgment where not all of the alternative grounds of liability submitted to the jury were supported by evidence and the error in submitting particular unsupported grounds to the jury had been properly preserved by motion or request for instructions, is *Stephenson v. Grand Trunk Western Railroad,* 110 F 2d 401 (Circ. 7, 1940), cert. granted, limited to different question, 310 US 623, 84 L ed 1395, cert. dismissed, 311 US 720, 85 L ed 469. In that case the Seventh Circuit Court of Appeals was of the opinion that it was bound by the rule of the Illinois state court that a judgment for plaintiff must be affirmed on appeal if any one of the counts of negligence submitted to the jury is supported by evidence even though the court, over proper objection, also submitted to the jury other counts not supported by evidence upon which the verdict could have been based. As authority that the state practice controlled in this matter, the Court cited the old case of *Bond v. Dustin,* 112 US 604, 28 L ed 835 (1884). With deference to the Seventh Circuit Court of Appeals, we think that its decision to follow a rule of Illinois appellate practice contrary to the established federal rule was wrong, and even if not wrong at the time of the decision, it is certainly wrong today. *Bond v. Dustin,* supra, the old case relied upon, held that the old "Conformity Act" (then R. S. §914, later former title 28 USC §724) required that a federal circuit court sitting in Illinois apply, **in its trial practice**, an Illinois statutory rule that a general verdict given on several counts in a declaration should not be set aside if it is supported by one or more of those counts even though other counts in

the declaration failed to state a cause of action. Of course the Conformity Act made state procedures applicable only in the federal **trial** courts and never had any application to federal **appellate** proceedings which "are governed entirely by the acts of Congress, the common law, and the ancient English statutes." (*Camp v. Gress,* 250 US 308, 318, 63 L ed 997, 1003 (1918).) And certainly the question whether error in submitting to the jury an issue unsupported by evidence is or is not prejudicial and ground for reversal on appeal is a question of appellate, not trial practice. Moreover, Congress repealed the Conformity Act by the Act of June 25, 1948, c. 646, §39, 62 Stat. 869, as amended, May 24, 1949, c. 139, §141, 63 Stat. 109, 28 USCA "§§2281 to end of text" p. 342. Since the Conformity Act has been repealed, and since the present action is one under a federal statute, there is no possible ground for applying any other than federal rules of law in determining whether error committed in the district court constitutes ground for reversal of the judgment.

In one respect the case at bar presents an even stronger case for reversal than did *Wilmington Star Mining Co. v. Fulton,* supra, and the cases following it. In those cases it was held reversible error to submit to the jury, without sufficient supporting evidence in the record, one of several alternative grounds of liability on the **same cause of action.** Here the unsupported claim erroneously submitted—for conscious pain and suffering of the decedent—would, if established, constitute by itself an **independent** cause of action which survived for appellee's benefit under §9 of the FELA (45 USCA §59), **separate and distinct** from appellee's other asserted cause of action for pecuniary loss to the surviving beneficiaries of the decedent, arising under §1 (45 USCA §51). (See pp. 13-14, supra.)

IV.

THE FEDERAL "HARMLESS ERROR" STATUTE DOES NOT ALTER THE RULE THAT ERRORS IN JURY INSTRUCTIONS ARE PRESUMPTIVELY PREJUDICIAL, AND REQUIRE REVERSAL ABSENT AN AFFIRMATIVE SHOWING THAT THEY ARE HARMLESS

The scope of those errors in proceedings leading to a judgment in a United States District Court which will **not** constitute ground for reversal on an appeal taken from such judgment to a United States Court of Appeals is defined by §2111 of title 28, USCA:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This section, enacted May 24, 1949, is practically identical to the second sentence of §269 of the former judicial code (former 28 USC §391) enacted February 26, 1919.

The United States Supreme Court has repeatedly held that this section "does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (*McCandless v. United States,* 298 US 342, 347-348, 80 L ed 1205, 1209 (1936), reversing judgment in condemnation action for error in excluding evidence of particular use to which land could be put and instructing jury to ignore possibility of such use.)

In *United States v. River Rouge Co.,* 269 US 411, 421. 70 L ed 339, 346 (1926) the judgment in a condemnation suit was reversed for error in instructing the jury that it should not consider certain benefits to the defendant land

owner as offsetting the damages awarded. The Court there declared that the rule that error relating to the substantial rights of the parties is ground for reversal without an affirmative showing of harmlessness is especially applicable when the error is embodied in the charge to a jury.

In *Fillippon v. Albion Vein Slate Co.,* 250 US 76, 82, 63 L ed 853, 856 (May, 1919), cited with approval in both *McCandless v. U. S.,* supra, and *U. S. v. River Rouge Co.,* supra, the Court used even stronger language, saying:

> "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

The same rule is quoted and invoked in *Thomas v. Union Railway Co.,* 216 F 2d 18 (Circ. 6, 1954) and *Majestic v. Louisville & N. R. Co.,* 147 F 2d 621 (Circ. 6, 1945).

In the present case the errors in submitting to the jury the question of damages for conscious pain and suffering and of refusing to instruct them to ignore such damages could not be harmless unless it **affirmatively appeared** that the jury had not included such damages in its verdict of $75,000.00. Obviously such affirmative showing cannot be made on this record. The figures in the record pertaining to the anticipated earnings of the decedent, the work expectancy of the decedent and the present value of financial contributions which decedent might have made to plaintiff and her daughter, discussed above (pp. 15-18, supra), show that the jury may well have awarded a very substantial sum for conscious pain and suffering under the instructions of the Court.

CONCLUSION

There is no evidence to support any award to appellee of any sum for conscious pain and suffering, and appellant was prejudiced by the probable inclusion in the general verdict, under an erroneous instruction and in the absence of a requested instruction erroneously refused, of a substantial sum for this claimed element of damage. These prejudicial errors in instructing the jury require that the judgment below be reversed.

Dated: November 15, 1955.

A. B. Dunne
John W. Martin
Dunne, Dunne & Phelps
Attorneys for Appellant

(Appendix Follows)

APPENDIX

PRESENT VALUE OF $2,400.00, $3,000.00 AND $3,600.00, DISCOUNTED AT RATES OF 3%, 4% AND 5% FOR EXPECTANCIES OF FROM 8 TO 13 YEARS:

Years	Decedent's Age	Rate of Interest	Annual Contribution in Dollars	Present Value
8	64 years, 8 mths.	3%	2,400.	16,845.
		3%	3,000.	21,057.
		3%	3,600.	25,268.
		4%	2,400.	16,156.
		4%	3,000.	20,196.
		4%	3,600.	24,235.
		5%	2,400.	15,511.
		5%	3,000.	19,389.
		5%	3,600.	23,266.
9	65 years, 8 mths.	3%	2,400.	18,686.
		3%	3,000.	23,358.
		3%	3,600.	28,029.
		4%	2,400.	17,844.
		4%	3,000.	22,305.
		4%	3,600.	26,766.
		5%	2,400.	17,056.
		5%	3,000.	21,321.
		5%	3,600.	25,585.
10	66 years, 8 mths.	3%	2,400.	20,472.
		3%	3,000.	25,590.
		3%	3,600.	30,708.
		4%	2,400.	19,464.
		4%	3,000.	24,330.
		4%	3,600.	29,196.
		5%	2,400.	18,530.
		5%	3,000.	23,163.
		5%	3,600.	27,595.
11	67 years, 8 mths.	3%	2,400.	22,204.
		3%	3,000.	27,756.
		3%	3,600.	33,307.
		4%	2,400.	21,024.
		4%	3,000.	26,280.
		4%	3,600.	31,436.
		5%	2,400.	19,934.
		5%	3,000.	24,918.
		5%	3,600.	29,901.

Years	Decedent's Age	Rate of Interest	Annual Contribution in Dollars	Present Value
12	68 years, 8 mths.	3%	2,400.	23,889.
		3%	3,000.	29,862.
		3%	3,600.	35,834.
		4%	2,400.	22,524.
		4%	3,000.	28,155.
		4%	3,600.	33,786.
		5%	2,400.	21,273.
		5%	3,000.	26,592.
		5%	3,600.	31,910.
13	69 years, 8 mths.	3%	2,400.	25,521.
		3%	3,000.	31,902.
		3%	3,600.	38,282.
		4%	2,400.	23,964.
		4%	3,000.	29,955.
		4%	3,600.	35,946.
		5%	2,400.	22,543.
		5%	3,000.	28,179.
		5%	3,600.	33,814.

No. 14,813

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,
Appellee.

APPELLEE'S BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

We are at a loss to know what the appellant expects to gain by this appeal.

The husband and father, a lifetime railroad employee, was killed through the negligence of his employer.

He was a conductor, 56 years of age, earning in excess of $5700 annually. His widow, 50 years of age, and his minor daughter, 10 years of age, were given by the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, the right to recover the damages they sustained by reason of his death.

The appellant by its answer admitted its liability therefor.

Unless the widow and daughter were required to yield to the dictates of the employer, the wrongdoer, they could only proceed by the one method provided them by law of obtaining redress—by instituting a lawsuit.

This they did.

A Court and jury awarded them a modest sum: $75,000.

The sole claim on this appeal is that this was too much because the jury awarded damages for an item—conscious pain and suffering—which they had no right to consider. It is said the trial Court should not have submitted that issue and indeed should have given appellant's requested instruction affirmatively eliminating it from the consideration of the jury.

The verdict of the jury was general.

There is no way by which it can be established that the jury allowed *anything* for conscious pain and suffering.

To give color to its claim, appellant is obliged to pretend, and this it does variously by assumption, by speculation, and even by flat assertion, that the proof of the loss to the widow and daughter is not sufficient in itself to sustain the award of $75,000 (why appellant does not rest its appeal on this claim alone is interesting), that an award of a sum sufficient to eke out the difference was made for conscious pain and

suffering, and that since the amount so awarded is unascertainable, the general verdict and judgment are vulnerable.

Anyone at all familiar with awards in death cases of this class will recognize at a glance the propriety of the jury's action in thus awarding such a sum—conservative it is true—but one still fair to both parties.

The decisions of this Court, of the Supreme Court, and of the Courts of California, establish that this award was just and proper.

In addition, these decisions reject the precise claims made here by this same appellant, through its present counsel, in other like cases in the past.

Furthermore, very recent decisions of this Court and of the Supreme Court specifically and categorically reject the contentions now made by the appellant here.

All these decisions, except those, of course, which were rendered since the motion for new trial herein was heard, were fully presented upon the trial of this case and the hearing of the motion for new trial by the appellee in extended written briefs, and on both occasions the trial Court fully and carefully considered and denied these exact claims.

Significantly, appellant on those occasions presented none of these decisions to the trial Court and has chosen to ignore them here.

It is manifest that whatever its present success, the appellant, because of its admission of liability for

the damages sustained by the widow and daughter, must inevitably, in the long run, pay them. It can hope at best then to only win a battle, for it has already lost the war.

It seems to us that what the appellant is seeking here, is, in the circumstances, inexplainable on any theory consistent with propriety. It of course is to be noted (deceased was killed on February 24, 1954) that appellant has already succeeded in delaying the widow's and child's use of that which is due them for a period of 10 months.

We cannot imagine that the appellant here will run counter to the language of the late Justice Jackson of the Supreme Court in *Miles v. Illinois Cent. R. Co.* (1942) 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, 146 A.L.R. 1104, and hide "behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad".

The nature of appellant's claims, made in the teeth of the decisions so completely refuting them, presents, we think, in a death case of conceded liability for substantial damages, a rather startling picture.

This we shall show under the headings:

I. The Jury's Award of $75,000 Damages is Not Only Warranted by the Record but it is in the Circumstances a Modest One.

and

II. Recovery for Conscious Pain and Suffering Was a Submissible Issue Upon the Record and the Jury Was Entitled to Award a Substantial Sum

Therefor, But Even Though That Issue was not Submissible, That Fact in no Wise Renders the General Verdict Vulnerable to Attack.

If any of these several propositions are sustainable, then this appeal must necessarily fail.

I.

THE JURY'S AWARD OF $75,000 DAMAGES IS NOT ONLY WARRANTED BY THE RECORD BUT IT IS IN THE CIRCUMSTANCES A MODEST ONE.

There are certain guides laid down by the U. S. Supreme Court which govern the award here, not only because this is a death case under the Federal Employers' Liability Act but because it is a suit to be weighed under the principles peculiarly applicable to cases arising under that Act.

These principles and the facts to which they are applicable include:

(a) The jury is the tribunal to determine the issues, and any departure from such a course is "taking away a great *portion of the relief which Congress has afforded them (railroad employees)*".

Bailey v. Central Vermont Ry. (1943) 319 U.S. 350, 63 S.Ct. 1062, 1064, 67 L.Ed. 1944;

Tennant v. Peoria & P. U. Ry. Co. (1944) 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520;

Blair v. Baltimore & O. R. Co. (1945) 323 U.S. 600, 65 S.Ct. 545;

Lavender v. Kurn (1946) 327 U.S. 645, 66 S.Ct. 740;

Ellis v. Union Pac. R. Co. (1947) 329 U.S. 649, 67 S.Ct. 598;

Wilkerson v. McCarthy (1949) 336 U.S. 53, 69 S.Ct. 413.

(b) The "court must consider extent of plaintiff's injuries, his education, station in life, and character, and *must view evidence as to damages most favorable to plaintiff* in light of rule that amount *of damages is primarily for jury.*"

Affolder v. New York C. & St. L. R. Co. (D.C. Mo. 1948) 79 F.Supp. 365;

Malone v. Suburban Transit Co. (D.C. S.C. 1946) 64 F. Supp. 859 (affirmed 156 F.2d 422).

The cost of an annuity in a responsible life insurance company (*Estabrook v. Butte, Anaconda & Pacific Ry. Co.* (9 Cir. 1947) 163 F.2d 781) such as the Metropolitan at $10 per month would be $2,148.18; at $400 per month the figure is $85,920.

Also, the present value to provide $1 per month for 16.05 years at an annual interest rate of 2½% is $158.65. (TR 82, 83.) To provide $400 per month, you reach the figure of $63,460 resulting from a multiplication of the base figure of $158.85 by $400. (TR 83-85.)

Thus, without any resort to damages for conscious pain and suffering, it is apparent that the jury could

well have found on strictly dollars and cents loss alone, the sum of $85,920. Appellant in its calculations both in the trial Court and upon this appeal carefully avoids any recognition of the sum the jury could have awarded to Kathleen Heavingham for the loss "of her father's care". An award of the sum of $25,000 for this item was permissible.

Miller v. Southern Pacific Co. (1953) 117 Cal. App. 2d 492, 256 P. 2d 603, cert. den. 346 U.S. 909, 74 S.Ct. 239;

Thomas v. Conemaugh Black Lick Railroad (DC 1955 Pa.) 133 F. Supp. 533.

In *Miller v. Southern Pacific Co.* supra, the Court held that an award of $20,000 to the children "for the loss of their father's care, attention, instruction, training, advice and guidance" was proper.

The appellant concedes that decedent's gross earnings for the year 1952 were $5,722.01. In 1953, $5,574.34. (p. 9 Appellant's brief.)

Appellant labors to reduce these earnings by various methods and claims, including the assumption that the decedent spent on himself $100 per month. (p. 16 Appellant's brief.)

It should be noted that the appellant arrives at this assumption directly contrary to the testimony of the widow which he cites that "Appellee testified she did not believe decedent's expenses amounted to $100 per month". (p. 10 Appellant's brief.) Yet, appellant transforms her denial by the simple expedient of assertion into an admission that these expenses did

amount to $100 per month. The actual proof is as stated and the detail of it is the following:

Mary V. Heavingham, special administratrix and the widow testified:

"Q. Who handled his pay checks?

A. Well, he brought it home and we usually went together and cashed it.

Q. And what was it devoted to, the proceeds?

A. Well, most of it went to the home, the family." (TR 99.)

* * * * * * *

"Q. And I believe you stated, Mrs. Heavingham, that your husband ordinarily would bring his check home and you would cash it together, is that right?

A. Yes.

Q. And then he would take from the bank, I presume, whatever he required for his personal expenses, is that right?

A. Well, he would always ask me for what money he needed.

Q. I see. But he did take sums of money for his own personal expenses such as meals, clothing, and that type of thing, is that right?

A. That's right.

Q. And would you say that that sum of money would average, say, a hundred dollars a month?

A. I don't think so. I never kept track of it, but I don't think he ever——

Q. Could it have averaged a hundred dollars a month?

A. Well, I don't think it would be that much.

* * * * * * *

Q. So that we are clear on this, Mrs. Heavingham, the expense Mr. Heavingham did draw

on occasion, regularly, were sums of money for his own use, personal use, is that correct?

A. Well, I always gave it to him, whatever he asked.

Q. And out of the balance you ran the house, is that correct?

A. Yes.

Q. And provided the food for the family?

A. Yes.

Q. And I suppose both he and you bought the clothing for him, is that right?

A. That's right.

* * * * * * *

Q. While I appreciate you can't give us figures and Mr. Martin understood that in his questions, I want to ask you in the light of his own questions, would you say that practically everything your husband made went for yourself and your family?

A. Just about." (TR 102, 112, 113, 114.)

We shall not take the time and space to deal extensively with appellant's erroneous assumptions and calculations in its brief.

Suffice it to say, these and the methods employed are exactly the same as those used by it in *Miller v. Southern Pac. Co.* supra wherein they were both condemned and rejected.

In the *Miller* case the Court said:

"Our use of defendant's breakdown and analysis of the lump sum award is no indication that we deem it legally proper to make the various assumptions involved; e.g., the assumption that the jury awarded $20,000 for Miller's pain and

> suffering and $60,032.50 for the support of his widow and children. We have used that method and those figures merely by way of illustration and as a convenient vehicle of discussion supplied by the defendant." 256 P. 2d 603, 613.

It is to be noted that the defendant there, as here, made flat assumptions as to what the items of damage were and even then in that connection failed as here to make allowance to Kathleen Heavingham for the loss of "her father's care", whereas the Court in the *Miller* case in rejecting appellant's claims, held that the jury could have awarded the sum of $20,000 "to Miller's children for the loss of their father's care, etc." (p. 613.)

Other grave errors entering into appellant's assumptions and methods include the following:

Appellant claims, at page 15 of its brief, that any financial contributions to his dependents would have to come from decedent's take-home pay. For this proposition it cites *Wetherbee v. Elgin, Joliette & Eastern Ry. Co.*

This same claim upon the same authority, and it is to be observed that this is the sole authority appellant relies upon for this astounding proposition, was made to the District Court of Appeal in the *Miller* case in its opening brief. The claim was made that the *Wetherbee* case was decisive of the issue in the *Miller* case.

The District Court of Appeal, in rejecting this contention, found it unnecessary to even refer to the

Wetherbee case. Furthermore, the Supreme Court, by its denial of certiorari, confirmed that the *Wetherbee* case was wrong.

It should be here noted that what the Court in the *Wetherbee* case attempted to do and what this defendant in the *Miller* case and in this case seeks to do are rejected out of hand by the most recent decision of the Supreme Court. In *Southern Railway Co. v. Neese* (4 Cir. 1954) 216 F. 2d 772, there was an award in an FELA case of $60,000 for the death of an unmarried 22-year-old railroad car inspector. His annual income was $2180 and he lived with his mother and father, to whom he allegedly contributed $30 or $40 per month.

The trial Court, on motion for new trial, required a remittitur of the sum of $10,000 and judgment was entered for $50,000. On its appeal the railroad company, like the appellant here, upon authority of the *Wetherbee* case, claimed that the evidence of decedent's "take-home pay" did not sustain the award made and that the judgment should be reversed.

There, as here, appellant submitted involved calculations upon various assumptions. The Court of Appeals agreed with the appellant. It indicated that the jury used "a fantastic assumption" in making the award. (p. 775.)

It harshly concluded "even under the most unreasonable expectations voiced by the parents, it is not necessary that a fund of $50,000 be provided by Southern."

It uses the measure of "take-home pay" in ascertaining what an annual yield from decedent's earnings would be.

It says:

> "A total contribution of $50,000.00 by young Neese to his parents, had he and they lived out their normal expectancies, seems to us far beyond the pale of any reasonable probability and entirely without support in the record. See Wetherbee v. Elgin, J. & E. R. Co., 7 Cir., 191 F. 2d 302; Virginian R. Co. v. Armentrout, 4 Cir., 166 F. 2d 400; 4 A.L.R. 2d 1064; Cobb v. Lepisto, 9 Cir., 6 F. 2d 128; Sheehan v. New York, N. H. and H. R. Co., D.C., 18 F. Supp. 635, 637."

It concludes that the sum of $50,000 damages for the death of this son "is without support in the record". It says:

> "The judgment appealed from will accordingly be affirmed in so far as it adjudges liability on the part of defendant for Neese's death but will be reversed for failure of the judge to set aside the verdict as to damages, *which is without support in the record even as to the amount to which it has been reduced,* and the case will be remanded for a new trial confined to the issue of damages."

On November 22 of this year after Appellant's brief was served, the Supreme Court of the United States, 76 S.Ct. 131, in a per curiam decision, reversed out of hand this decision of the Court of Appeals, saying:

> "For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and

> accordingly that its action should not have been disturbed by the Court of Appeals."

Frankly, in the circumstances of this appeal, we felt the necessity of directing Appellant's attention to this decision as dispositive of this appeal. With the same purpose, we called Appellant's attention to the decisions of the Supreme Court hereinafter reviewed in *Snyder v. U.S.* (4 Cir. 1954) (D.C. Md.) 118 F. Supp. 585, 218 F. 2d 266, and *U.S. v. Union Trust Co.* and *Union Trust Co. v. Eastern Air Lines, Inc.* (1953) 113 F. Supp. 80 (D.C. Cir. 1955), 221 F. 2d 62, and handed down December 5, 1955.

The first two were Federal Tort Claims Act cases.

In the *Snyder* case, a government bomber crashed into a house, causing death to three persons and serious injuries to three others. The trial Court found that the government was liable and that the widow and minor children were entitled to recover for the death of a husband and father the sum of $131,250 damages.

The Circuit Court of Appeals, in its decision 218 F. 2d 266, reversed this award and reduced the sum allowable to $87,500. It said at page 268:

> "We think that this award, which was more than twice as much as any award in the State of Maryland on account of wrongful death, was clearly erroneous."

It reviews decedent's earnings and the character of his business.

It said further:

> "Life expectancy, earnings and contribution to family support in a case such as this are largely a matter of speculation; but on the whole record we do not think that an award of more than $87,500 for the death of Mr. Guyer can be justified."

The United States Supreme Court, summarily reversing the Circuit Court of Appeals and reinstating the judgment of the trial Court, in a per curiam decision, stated:

> "The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the judgment of the District Court reinstated."

In *Union Trust Co. of District of Columbia v. United States,* and the companion case of *Union Trust Co. v. Eastern Air Lines, Inc.,* supra, a Tort Claims suit was brought against the government and an action was likewise brought against the airplane company in which they were passengers for the wrongful death of a husband and wife, in collision with another plane.

The trial Court under the Tort Claims Act found against the government and concurred in the jury's verdict against the Air Line Company of $50,000 for the death of the husband and $15,000 for the death of the wife.

The Court of Appeals for the District of Columbia in its decision, 221 F. 2d 62, supra, concluded that

the evidence was insufficient to sustain the judgment against the Air Lines but held that it was sufficient as against the United States except that the awards for damages would have to be reduced to conform to the limits for the death of one person under the Law of Virginia which is $15,000.

In *U. S. v. Union Trust Co.,* the Supreme Court in a per curiam decision said:

> "The petition for writ of certiorari is granted and the judgment is affirmed."

In the companion case of *Union Trust Co. v. Eastern Air Lines, Inc.,* in a further per curiam decision, the Court said:

> "The petition for writ of certiorari is granted and the judgment is reversed."

Of course, there is an additional vice which is inherently, though not expressly, condemned by the foregoing review and which undermines the very basis of appellant's calculations. This vice is the assumption that "take-home pay", no matter what items were deducted from the pay check, is the extreme limit of the sum which the jury could use to find the pecuniary loss to the widow and daughter.

Such an assumption is wrong because (1) income tax deductions are not in a personal injury case rightfully deductible from earnings of either an injured person or one deceased in determining what his actual earnings were, (2) the deductions might well include in a given instance what is actually the creation of an asset for the benefit of a family, and

(3) earning capacity and not mere pay check after deductions is the measure of the "pecuniary contributions" which furnishes the basis for the jury's determination as to what might have been contributed to the family.

As to (1), it is interesting to observe how often in the trial Courts, state and federal, the appellant has been able to create confusion by a claim that an injured person's loss of wages is to be measured by pay check less income tax deductions.

Strangely enough, the appellant uses the language of this Court in *Southern Pac. Co. v. Guthrie* (9 Cir. 1949) 180 F. 2d 295 (1951) 186 F. 2d 926, cert. den. (1951) 341 U.S. 904, 71 S.Ct. 614, 95 L.Ed. 1343, wherein it is said (p. 927):

> "We also considered that calculation should be based on no more than $6000 a year, because of necessary tax deductions. *We think the court's view that the net take home pay, after taxes, would represent the actual loss, is correct; but we are now convinced that we cannot tell how much this would be.* Under the tax law then in force, he could look forward to an additional exemption after age 65, and because he was married, the split income features of the law would give two additional exemptions when his wife reached 65, something about which we cannot tell. All we do know is that in 1946, his income tax on $5,165.92 was $724 less a 'rebate' of 'around $200'.
>
> "In the nature of such a case there is bound to be some uncertainty, even as to such pecuniary matters as future earnings. What Guthrie's ultimate earnings, net or gross, would be, cannot be

> foretold. While it may be prophesied that during his lifetime income taxes will continue, there is not equal certainty as to their impact on him. In Chicago & N. W. Ry. Co. v. Curl, 8 Cir., 178 F. 2d 497, 502, the court held it not prejudicial error to refuse evidence of the amount of income tax and other deductions, because of the inherent uncertainty in such matters, saying, 'We may assume that the jury were aware of * * * the fact that the average earnings, net or gross, of the appellee for the future could not be definitely known'." (Emphasis added.)

The fact is there is no warrant for the deduction of income taxes in this respect.

In *Chicago & N. W. Ry. Co. v. Curl* (8 Cir. 1949) 178 F. 2d 497, it was also said (p. 502):

> "The actuary who testified for appellee based his computations on appellee's average gross income for several years prior to the action, and the court refused to receive appellant's offer of proof of appellee's average net earnings after deductions. Appellant offers no authority in support of this contention. But see and compare Stokes v. United States, 2 Cir., 144 F. 2d 82, 87; Cole v. Chicago, St. P., M. & O. Ry. Co., D.C., 59 F. Supp. 443, 445; Majestic v. Louisville & N. R. Co., 6 Cir., 147 F. 2d 621, 626-627. We conclude that there was no prejudicial error in the court's refusal to accept appellant's offer of proof."

In *Cole v. Chicago, St. P., M. & O. Ry. Co.* (D.C. Minn. 1945) 59 F. Supp. 443, the Court quoted with approval from *Advance v. Thompson,* 320 Ill. App. 406, 51 N.E. 2d 334, 341, saying (p. 445):

"In the case last cited the court said: 'As a court of appeals, in passing upon the question of alleged excessive damages, we can neither speculate nor conjecture as to how plaintiff's financial status might be affected in the future by business booms or depressions; by the uncertainties of the labor situation after the war, or how his earnings might be affected by his expenses away from home, taxes, work clothing, union dues, social security and old age pension. We assume that the jury took these matters into consideration in arriving at their verdict and that the trial court did the same in entering the remittitur. Nor can we in a personal injury case reduce the amount of the verdict to a matter of mathematical computation. De Fillippi v. Spring Valley Coal Co., 202 Ill. App. 61. Nor can we compute the earning capacity of the amount awarded plaintiff at any given rate of interest. Apparently counsel for defendant expects this court to do all this. We do not find it within our province to do so.'

"While this quotation relates to the duty of the appellate court, it is applicable here."

In *O'Donnell v. Great Northern Ry. Co.* (D.C. Calif. 1951), U. S. District Judge Rubey Hulen, sustaining an award of $65,000 for personal injuries, said:

"There is no authority for deducting income tax at an estimated liability, in determining present value of future earnings. The jury was not so instructed. Defendant requested the Court to so instruct. No exception was taken to the refusal of the instruction."

In addition to these authorities there are collected the cases dealing with the subject in 9 A.L.R. 2d 320.

This annotation purports to collect all of the reported cases in the United States, England, Scotland and Canada. In no case reviewed was income tax liability permitted to be considered in determining damages for loss of earning capacity. The manifest reason for not including income tax deductions in measuring the adequacy of an award for personal injuries is well stated in *Billingham v. Hughes* (1949) 1 K.B. 643, 9 A.L.R. 2d 311. Lord Justice Singleton said (p. 318):

> "Though the principle has always been to seek to arrive at the pecuniary loss of the individual, the practice in the courts of this country has consistently been not to have regard to income tax in the assessment of damages; and to alter the practice now would lead to great confusion, and would add immeasurably to the difficulty of assessing damages and in the direction to be given to a jury. Consider the cases of four different men each earning 2,000£ a year. A has no other income but has a wife and young children. B is a bachelor with an investment income of 2,000£ a year. C has a farm on which he makes a loss of 500£ a year which can be set off against his other income for tax purposes. D by covenant or otherwise has disposed of half his income. If each of those four men is injured and away from work for a year, is the assessment of pecuniary loss to be on a different basis in each case because the amount of tax payable by each on his earned income differs? A man's income is his own and he can do with it what he likes. Income tax is a charge on the person, and not on property or gains; * * *."

It was no doubt the reasoning set forth in these cases that caused the Court to say in *Stokes v. United States* (2 Cir. 1944) 144 F. 2d 82, 87:

> "We see no error in the refusal to make a deduction for income taxes in the estimate of libelant's expected earnings; such deductions are too conjectural."

In *Smith v. Pennsylvania R. Co.* (Ohio, 1950) 99 N.E. 2d 501, wherein a verdict in a death case was sustained, the Court said:

> "We hold that it is not proper to deduct from the annual income of plaintiff's decedent Federal Income Taxes in determining the amount which the decedent would have contributed to his wife and children had he lived. Such taxes are too speculative to be considered by the jury. Stokes v. U. S., 2 Cir., 144 F. 2d 82; Chicago & N. W. R. Co. v. Curl, 8 Cir., 178 F. 2d 497. While the verdict is larger than usual we find no basis for a conclusion that the verdict is so excessive that it appears to have been given under the influence of passion or prejudice. There is no factual basis to support this charge."

It is passing strange, if there were the slightest basis for appellant's contention in this respect, that the Courts in the cases elsewhere reviewed, wherein the awards covered a wide range, failed to apply the rule contended for by appellant, and, indeed, counsel, including attorneys for the appellant here, forgot to mention the subject.

As to the second reason, it is self evident that the deductions might well include in a given instance

what is actually the creation of an asset for the benefit of a family.

The language of the cases is that the cause of action is not for damages measured by "take home pay" but rather, as stated by the appellant itself at page 14 of its brief, for damages consisting of "compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased".

The difference between "pecuniary benefits" and a pay check is as glaring as between a pay check and earning capacity.

Earning capacity and pecuniary benefits here are synonymous.

That earning capacity and not pay check is the measure in these cases is established by *Hosman v. Southern Pac. Co.* (1938) 28 Cal. App. 2d 621, 83 P. 2d 88, cert. den. 306 U.S. 656, 59 S.Ct. 645, 83 Law. Ed. 1054; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 Cal. App. 2d 795, 151 P. 2d 647; *Foster v. Pestana* (1947) 77 Cal. App. 2d 885, 177 P. 2d 54.

What was the pecuniary loss, and presently we are only referring to dollars and cents, to the widow and daughter as measured by decedent's earning capacity?

It was manifestly not limited to a consideration of the "take home pay" of the decedent at the date of his death. It must be based upon whatever the record and the inferences to be drawn from it indicate the earning capacity and the contributions therefrom would ultimately be.

Appellant endeavors to freeze the entire matter by concluding that the deceased would not have worked to the end of his life expectancy. We pause momentarily to inquire, how does the appellant know what at the longest the decedent would have lived and worked?

It claims that evidence introduced by it and received over appellee's objection to the effect that "the average age of retirement of trainmen such as decedent is between 66 and 67", is conclusive. It cites no authority to this effect. Indeed, if there ever was a good reason why an individual person should not become a statistic measurable by mathematics, it is present in a case of this kind.

This proposition is at once established by the instruction regarding mortality tables and the principle that the tables are neither binding nor conclusive and that the jury may find that an individual person upon the record might live a shorter or longer period than that set forth in the tables.

Here we have undisputed evidence of the outstanding physique of the husband and father.

He was a plasterer; he was a hod-carrier, a strong man. (TR 97.) His health was very good. (TR 98.) Photographs of him were received in evidence.

Furthermore, as is the character of the railroad business, Heavingham's increased seniority with the passing of time to the end of his period of service would ever improve. (TR 98, 102, 103.) It was "a continuing up-grade thing in relation to both the kind

of run he could hold and the kind of money he could earn up to the time of his death. (TR 102, 103.) Indeed, the Court has a right to take judicial notice of this. *Patton v. Baltimore & O. R. Co.* (D.C. Pa. 1953) 120 F. Supp. 659, 666, 667, 197 Fed. 2d 733, 214 Fed. 2d 129.

With this in mind it is readily apparent that on an ever increasing scale of earnings, with passing time decedent's gross earnings might have been $10,000 or $12,000 a year.

Indeed, the press carries a recent story (since the trial of this case) of a railroad conductor who died a millionaire.

This was Walter W. Bradford, and the publication was in the San Mateo, California, Times of March 4, 1955 under the caption "Million Left by Retired SP Conductor."

The issue of Labor of April 2, 1955 carries the names of three railroad men in their eighties as still active. They are Irving Witherspoon, 85 on March 17 of this year, a passenger conductor of Fort Worth, Texas, Maxey Callaway, 83, a passenger conductor on the Gulf, Colorado and Santa Fe, and A. L. Beers, 81, who "still regularly mounts the cab of a big diesel as an engineer on the Milwaukee Road's run between Austin, Minn., and LaCrosse, Wis."

In addition, there is William Braney, a conductor on the Boston and Maine, who was still running a train at the age of 81 at the time of trial.

At the time of the preparation of this brief the San Francisco Examiner carried a photograph and a story of Ex-Railroader William Perry. After stating that Perry is now 103 years old, the item in part stated:

> "He was born in 1852 in Oklahoma Indian Territory and in the 1880's drove a horse car here. Later he switched to railroads and was retired from the Southern Pacific Bayshore yards in 1929 at 76.
>
> " 'He's full of pep and, thank the Lord, his mind is as clear as a bell', Mrs. Mowatt said admiringly."

It is manifest that appellant's efforts to determine for itself under the guise of analysis and computation what the jury could and did award is only an attempt to arrogate to itself the rights and duties of the fact finding body, the jury.

Its splitting up of the sum awarded by the general verdict into items of damages, its claims of take-home pay and the earning capacity on which pecuniary losses may be based, is arbitrary, without basis in the record, and fails to establish that the jury was not entitled to award without resort to "conscious pain and suffering" the full $75,000.

Indeed, a very recent decision of this Court precisely in point affirmatively establishes that the jury had the right to so award that sum and that its award cannot be disturbed on this appeal.

In *Boise Payette Lumber Co. v. Larson* (9 Cir. 1954) 214 F. 2d 373, there was an award of $75,000 to

the widow and an *afterborn* son. The husband made $450 per month, or between $5,000 and $6,000 a year.

There was no proof of the take-home pay nor of the reduction of earnings by deductions for income tax and other things.

Neither was take-home pay nor the formula sought to be applied by appellant here in any wise recognized.

Affirming plaintiff's judgment, this Court, speaking through Circuit Judge Chambers, said:

> "Appellant takes exception to the size of the verdict, in the amount of $75,000. Plaintiff testified that her husband's earnings were between $5,000 and $6,000 a year; that her husband was making $450 per month. The burden of a portion of appellant's argument seems to be that the appellee should have given evidence of the decedent's earnings over some considerable years and evidence that there was some probability his employment was apt to be stable. * * * As it was, without more, the jury was entitled to assume that the decedent was a $450 a month man and take that factor into consideration, among other factors, in assessing the damages of Mrs. Larsen and the infant.
>
> * * * * * * *
>
> "Of course, the damages were not alone to Mrs. Larsen, but also to the child.
>
> * * * * * * *
>
> "The testimony shows that the decedent was generally sober and industrious, that he was in good health and that his death was a heavy loss to the wife and to the afterborn son, not only from a financial standpoint but from the aspect of his society, which seems to be compensable in

Idaho. Idaho Code, 1947 Ed., § 5-311. A motion was made for a new trial, and among the grounds therefor was the one that the verdict is excessive and appeared to have been given under the influence of passion or prejudice and that the verdict bears no reasonable relation to the amount of damages sustained. The trial court does have a wide latitude in granting a motion for new trial, and had the trial court granted such a motion upon the ground that it thought the verdict high, it might have been within its range of authority. *That question is not here for decision.*

"It is the opinion of this court, while $75,000 is quite a lot of money, that a verdict for such an amount here is not monstrous, shocking or outrageous. Cf. Southern Pacific Co. v. Guthrie, 9 Cir. 186 F. 2d 926. This court, in a recent case, Baldwin v. Warwick, 9 Cir., 213 F. 2d 485, has assumed to interfere with a verdict of $50,000 in punitive damages where two gamblers, upon the verdict of a jury, must have been found to have given their victim a bad weekend from drugged drinks. *Yet the Baldwin case is not authority to meddle in a wrongful death case where the life of a young, industrious, intelligent, reasonably successful young man has been taken from his dependents.* 214 F. 2d 373 at 380." (Emphasis added.)

The sums paid in settlement by this appellant in other death actions speak eloquently here. They reveal that this appellant has *in settlement* paid as large or larger sums than that awarded by the jury in this case.

Payments so made by this defendant include the following:

There is reported in the issue of "Labor" of April 30, 1954 a settlement made by this defendant, after two days of trial, for $75,500. This was for the death of a brakeman and for the benefit of his surviving wife and children. It was reported that this was "the largest ever made in this territory." The territory was Salt Lake City, Utah.

In *Miller v. Southern Pac. Co.,* supra, plaintiff recovered and the appellant paid $80,032.50 for the death of a brakeman with earnings of $4,200 a year and a wife and children.

In *Ginn v. Southern Pacific Co.,* number 31185 in the trial Court, this appellant, through the same firm of attorneys representing the appellant, before trial on July 22, 1953 paid the surviving widow upon stipulated judgment the sum of $50,000 for injuries resulting in death sustained by him on December 27, 1951. In that case liability was disputed. There were no children. Plaintiff's decedent was a freight train brakeman and conductor. He was nearly 56 years of age at the time of his accident and death. The widow was nearly 47 years of age. She was married to decedent for a period of something less than nine years. Plaintiff's death was instantaneous. He was knocked from his position from the top of a freight car to the rail below.

In *Tastor v. United States* (1954) 124 F. Supp. 584, Judge Oliver Carter allowed the widow and the nine-

teen month old son the sum of $68,000. There was no conscious pain and suffering.

In the case of *Betts v. Southern Pacific Co.,* number 126684-H, on earnings of $300 per month, Judge Harris awarded, and the appellant paid, $57,000. On the basis of $460 per month earnings, Judge Harris would have awarded $85,500. This does not take into account the lesser earning power of money as of that date.

In *Stone v. Southern Pacific Co.* (1951) Santa Clara County Superior Court number 76,523, plaintiff's widow and two children were awarded $90,000 for the death of a 26 year old car inspector.

Verdicts returned and judgments paid by this appellant and defendants in other cases include the following:

In *Buck v. Pac. Greyhound Lines* (Jan. 14, 1952) Superior Court, San Francisco, number 399,897, a verdict of $200,000 for the death of a man capable of earning $10,000 a year was returned.

In *Ze Layeta v. Pac. Greyhound Lines* (1949) Superior Court, San Francisco, number 359,798, a widow and fourteen year old child were awarded for wrongful death the sum of $75,000.

In *New York, N. H. & H. R. Co. v. Zermant* (1 Cir., 1952) 345 U.S. 917, 200 F. 2d 240, cert. den. 73 S. Ct. 729, 97 L.Ed. 1351, an award of $116,500 for death of 39 year old brakeman who earned $5,406.56 for a year prior to his death and who is survived by 31

year old widow and by four children under four years of age, and a fifth who was born posthumously.

In *Smith v. Pa. R. Co.,* 99 N.E. 2d 501, a verdict for $100,000 for the death of a yard conductor was affirmed.

In *Gall v. Union Ice Company,* Superior Court, Santa Clara County, number 68801, a verdict for $100,000 was affirmed.

In *Naylor v. Isthmian S. S. Co.* (D.C. N.Y. 1950) 94 F. Supp. 422, an award of $115,000 on plaintiff's decedent's earnings of only $2,600 per year to a widow and two children was sustained.

In *Holder v. Key System,* 88 Cal. App. 2d 925 (1948), 200 P. 2d 98, there was an award of $45,000 for the death of a 56 year old man with a life expectancy of 16.7 years. He earned $180 per month. The widow was 51 years of age. There were two adult children, but they were not dependent upon their father. This remarkable result was achieved by the other firm of attorneys, Ricksen, Freeman & Johnson, who represent this appellant in this area.

Decisions of various other courts are in accord:

In *Fritz v. Pennsylvania R. Co.* (7th Cir. 1950) 185 F. 2d 31, an award of $70,000 to the widow and two children of a railroad conductor under the Federal Employer's Liability Act was sustained.

In *McKee v. Jamestown Baking Co.* (3rd Cir. 1951) 198 F. 2d 551, the 3rd Circuit sustained a verdict of $70,000 to a wife and one child for the death

of a steelworker whose earnings averaged $3200 per year.

In *Thomas v. Conemaugh Black Lick Railroad* (D.C. Pa. 1955), 133 F. Supp. 533, a Federal Employer's Liability Act death case, the jury awarded to the widow and children of a railroad employee $100,000 damages, less the sum of $20,000 because of his contributory negligence, and the trial Court on motion for new trial sustained the award of $80,000.

It is clear that the jury had the right, without resort to damages for conscious pain and suffering, to find for plaintiff in the sum of $75,000, and that upon the record and the authorities the award was a modest one.

II.

RECOVERY FOR CONSCIOUS PAIN AND SUFFERING WAS A SUBMISSIBLE ISSUE UPON THE RECORD AND THE JURY WAS ENTITLED TO AWARD A SUBSTANTIAL SUM THEREFOR, BUT EVEN THOUGH THAT ISSUE WAS NOT SUBMISSIBLE, THAT FACT IN NO WISE RENDERS THE GENERAL VERDICT VULNERABLE TO ATTACK.

1. The evidence established conscious pain and suffering, the Court was authorized to submit that issue, and the jury was entitled to make an award therefor.

Defendant upon this appeal, as it did upon the trial and the motion for new trial, fails to grasp what the proof showed. It glaringly omits from its brief in its statement of the evidence relating to this issue the many significant and decisive aspects of the testimony.

Upon the trial there were introduced large photographs as exhibits portraying the accident, the crushed engine cab, and the physical conditions including dimensions involved. The defendant objected to the introduction of these exhibits—for what reason we are not informed. The trial Court refused to admit them all but did receive a number.

Defendant appears to be unaware of the significance of the fact that deceased was so close to the witness George E. Maasen that he "had come back to my side and stood right in front of me almost on my feet" (TR 32), and that "a steam pipe broke right in front of my [Maasen's] face and burned my face quite badly, my eyes and the side of my ears and neck", and that Maasen, despite being so burned and scalded, was not only able to do the things he thereafter did but survived to testify as a witness on this trial. Defendant ignores the fact that if Maasen could be so burned and so survive that the deceased could likewise have done so. Defendant overlooks the fact that Maasen was knocked out of the window of the cab. (TR 32.)

Defendant overlooks the facts:

That Maasen risked his own life to get the engineer and deceased out of the cab and that after all he had tried to do by himself alone he called upon a man to help him do so. Maasen said "I told him to give me a hand; I have got a fireman, a brakeman and an engineer there in that cab, help me get them out". (TR 33.)

That Maasen could only conceivably risk his own life in order to save that of Heavingham and of the engineer.

That Maasen, serving as fireman and promoted to locomotive engineer, was an expert in the operation and in respect of the structure and make-up of the locomotive and in relation to that which had transpired upon the collision.

That Maasen believed that Heavingham was alive and that he so believed during all the period from the time of the accident to the time he himself was taken away in the ambulance.

The defendant overlooks the decisive feature that in law and in fact Heavingham was alive when last seen and he was believed to be alive and that belief was so certain that for the full lapse of time until he was obliged to give up, Fireman Maasen not only believed but acted upon the assumption that Heavingham's life could be saved if he could but get to him. We submit that the very facts that both Maasen and Heavingham were scalded, that Maasen was thrown out but Heavingham couldn't get away, show that Heavingham's death was of necessity a delayed and an agonizing one.

We submit upon the mere narration of the fact that Heavingham died of "scalding burns over entire body" that his death could not have been and was not instantaneous and that of necessity he sustained conscious pain and suffering.

Of particular interest in this connection is the decision in *Giles v. Chicago Great Western Ry. Co.* (D.C. Minn. 1947) 72 F. Supp. 493, wherein the sum of $6,000 for conscious pain and suffering was held not excessive for the death of a section laborer who, while standing on the cab floor of a locomotive, was scalded in a collision. The Court stated the facts as follows:

> "Arriving at Alta Vista in a blizzard, the locomotive in which Eastman was riding collided with the rear end of said train at 12:11 p.m. on said date. As a result, live steam escaped into the cab, causing Eastman to sustain first, second and third degree burns, covering about sixty per cent of the surface of his body. Despite this, he was able to crawl through the cab window and walk a considerable distance in deep snow to defendant's depot. Here, together with several other injured employees, he reclined on the floor and was given first aid treatment, following which he was removed by ambulance, at about 3:30 p.m. on said date, to St. Joseph's Hospital at New Hampton, Iowa. From the time of the collision up to the time he was admitted to said hospital Eastman was conscious and in great pain. During this time he was constantly requesting drinks of water. He was attended by physicians at the hospital who performed a necessary operation involving debridement and cleaning of the burned areas. This was followed by the application of pressure bandages and medication. Penicillin and morphine were administered. He sustained considerable shock incident to exposure which, together with the serious injuries, caused his death at 6:30 a.m. on January 31, 1947."

There is a presumption by both State and Federal law that Heavingham remained alive from the time that Fireman Maasen last saw him until his death was shown.

In 15 Cal. Jur. 2d, Death, Sec. 2, page 78, it is stated:

> "*Presumption as to continuance of life.* The law presumes that a person once shown to be alive continues to be alive until a different presumption arises."

In *American Sugar Refining Co. v. Ned* (5th Cir. 1954) 209 F. 2d 636, it was held:

> "There is a presumption in favor of continuation of life until the contrary is shown."

In *Occidental Life Ins. Co. v. Thomas* (9 Cir. 1939) 107 F. 2d 876, this Court held:

> "A person who is alive when last seen is presumed to continue living until the contrary is shown."

In the face of these authorities appellant's slur at the presumption in saying in its brief (page 21) "even conceding, arguendo, *some sort of artificial presumption* of a continuation of life, etc." only serves to emphasize its failure to grasp what is involved. In addition to the testimony of Fireman Maasen and the presumption there was introduced in evidence a certified copy of the Death Certificate.

Defendant, at page 22 of its brief, says "the admission of this evidence over this objection was

error" and adds for good measure that "any such inference (of conscious pain and suffering) would be completely nullified by entries in the very same death record". It cites in support a decision which has nothing to do with the subject, *May Department Stores Co. v. Bell.*

Upon the trial and upon the motion for a new trial the authorities establishing the admissibility of this Death Certificate and the right of the jury to select from it those facts which in its view were determinative of the issue were presented. The defendant ignores those decisions also.

This Death Certificate was admissible in evidence by both explicit State and Federal Statutes, 28 U.S.C.A., Section 1732, and State of California H. & S. C., Section 10551.

It was the function of the jury and not even of the Court, leave alone the defendant, to say and determine for itself what the fact was. This it had a right to do in respect of the Death Certificate or any other piece of evidence which was directly conflicting within itself or with some other evidence in the case. Indeed, this function is peculiarly one of the jury in these Federal Employer Liability law cases.

In *Lavender v. Kurn* (1946) 327 U.S. 645, 66 S. Ct. 740, the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences,

a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusions reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis ours.)

In the very recent decision of *Thomas v. Conemaugh Black Lick Railroad* (DC 1955 PA.) 133 F. Supp. 533, an action like this under the Federal Employer's Liability Act for the death of a railroad employee, an award of $100,000 was reduced to $80,000 by the jury because of the contributory negligence of the deceased and there was presented the same legal proposition as that posed here. The Court there said, page 541:

"In admitting into evidence a Death Certificate and Coroner's Return of View, the court charged as follows:

" 'There is a provision of law that where a certificate of death or a coroner's certificate is offered in evidence, such certificate shall constitute prima facie evidence of its contents, but such certificate is always open to contradiction or explanation by either plaintiff or defendant, regardless of who offered it.

" 'The statements, therefore, which appear in the coroner's or death certificate are not conclusive and binding on either party to this proceeding, but are open to explanation, contradiction or modification, and are only prima facie evidence of the statements contained thereon.'

"Death certificates are admissible under Federal and Pennsylvania Statute. 28 U.S.C.A. § 1732; 35 Pa. P.S. §§ 450.101-450.1003.

"The law is firm to the effect that a death certificate is prima facie evidence of the facts stated therein, but is always open to contradiction by any of the parties regardless who offered it. [Citing many decisions.]

"I am satisfied that the law as enunciated in the court's charge is proper."

Other authorities to like effect are set forth in the annotations entitled "Presumption against suicide as overcome by Death Certificate, Coroner's Verdict, or similar documentary evidence" in 159 A.L.R. at page 181, and in a later annotation appearing in 28 A.L.R. 2d at page 352 entitled "Insurance: Coroner's verdict or report as evidence on issue of suicide".

In the main decision, *Fleetwood v. Pacific Mut. L. Ins. Co.* (Ala. 1945) 21 So. 2d 696, 159 A.L.R. 171 it was held that:

"A death certificate, signed by the coroner and certified by the state registrar of vital statistics, which by statute was made prima facie evidence in all courts and places of the facts therein stated, constituted direct and positive evidence of suicide

> which would prevail over the presumption against suicide, unless the plaintiff went forward with the case and introduced rebuttal evidence admitting of reasonable conflicting inference against suicide."

In *Hamilton v. Metropolitan L. Ins. Co.* (Ga. 1944) 32 S.E. 2d 540, dealing with a statute making Death Certificates prima facie evidence in all Courts and places of the facts therein stated, the Court held:

> "that the circumstantial evidence plus the proper introduction in evidence by the defendant of a certified copy of the death certificate, stating that the cause of death was suicide, made out by the only physician who saw him soon after he arrived at the hospital, and who attended him, made out a prima facie case that the cause of his death was the cause given in the death certificate."

The best evidence of Heavingham's having died an agonizing death are the facts supplied by the testimony of Fireman Maasen and the Certificate of Death. Heavingham was alive when last seen. He was dead and so known to be only when his body was removed from the wreckage, the detail of which the plaintiff did not go into, nor did the defendant supply any evidence upon the subject. This does not militate against the plaintiff, the fact of Heavingham's being alive having been established in the record.

In its endeavor to rule out conscious pain and suffering, appellant omits certain of the evidence from

its statement of facts at pages 4 to 8 inclusive of its Brief and seeks to infer that because Maasen heard no "outcry" or "any sound of a human voice of any kind" (p. 8), that Heavingham met an instantaneous death upon impact.

Appellant omits and overlooks the testimony of Fireman Maasen that

> "Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks." (TR 32, 33.)

and Fireman Maasen's further testimony

> "Q. In your testimony you referred to the fact the Mallet engine after the accident continued to work steam. Tell us how that operates and what sound, if any, is made, and describe the sound, if any.
>
> A. Well, the only thing the steam operated at that time would be the air pumps, which provides air for the brakes throughout the train, and they are quite loud, that is, the exhaust from them are quite loud when they are operating, and that is the only thing the steam would operate outside of the escaping steam.
>
> Q. That I will speak of in a moment. Now, tell us about the escaping steam and what sound, if any, came from it.
>
> A. Well, it was quite a noise, the steam escaping.

Q. How far away from the egnine were you when you were over at the ambulance which had arrived? Give us a rough estimate of distance.

A. Oh, I should judge it would be around 150 feet.

Q. You testified, and you correct me if I am wrong, that while you were at this ambulance you heard the steam cease.

A. On the way to the ambulance." (TR 67, 68.)

and

"Q. What was the effect, if any, of leaving of the fire having necessarily been left on after the accident; what would happen with that fire in there?

* * * * * * *

The Witness. A. The fire could very easily have caught the engine on fire." (TR 38, 39.)

The enlarged photographs showing the impact and wreckage of this locomotive and the caboose of the train ahead portray much that cannot be expressed in words and are eloquent as to what took place in the accident.

Fireman Maasen risked his life trying to find Heavingham and remove him from the wreckage. He did this on his own, having last seen Heavingham living. Can it now be said that Maasen, who was an expert in his field and so regarded by the Courts, and the best advised of anyone present at the time, as to what the situation and Heavingham's condition was, didn't know what he was doing and that upon a cold

record the defendant in this case can substitute its judgment for what actually occurred?

By the Certificate the death of Heavingham was shown.

Wherever the Certificate was beneficial to plaintiff it supplied affirmative evidence of the fact.

Wherever the Certificate ran into contrary evidence introduced by plaintiff (the defendant produced none it must be remembered), it was for the jury to determine the fact.

Completely destructive of defendant's position that Heavingham's death occurred upon the impact and directly sustaining a finding that in accordance with the physical facts, the testimony of Fireman Maasen, the Death Certificate and the natural result of the scalding did cause decedent to sustain conscious pain and suffering, is the decision in *American Sugar Refining Co. v. Ned,* 209 F. 2d 636, cited supra, the decedent fell from a barge into the water. His body was found several days later and his Death Certificate recited the cause of death as "asphyxia, due to drowning." (p. 637.) The Court held:

> "It is clear from the evidence that the deceased fell from the barge into the water; what caused him to fall is not shown by substantial evidence; it may have been caused by weakness or disease. The fall occurred on the shore side when the barge was several feet from the dock; the decedent was sitting upon a railing on the edge of the barge, and fell directly into the river. The fall by itself did not cause his death. If he had fallen upon the deck and expired immediately, the most

reasonable inference would have been that he had died of natural causes; but he was alive when he fell into the water and dead when his body was found floating in the river several days later. We have the commissioner's findings and evidence of the living man's tumbling into the water, together with other facts and circumstances in the record, which fairly warrant the inference that drowning caused his death."

Sustaining the verdict, the Court said:

"We are urged to hold as a matter of law that a living man who fell from a barge died from disease before he was asphyxiated by river water. Such a holding is not warranted by substantial evidence. There is a presumption in favor of the continuation of life until the contrary is shown. The preponderating evidence to the contrary here is that the man was drowned, which was an efficient, intervening, independent, unintentional, and unexpected event that shortened his life and put an end to his earthly existence. The death was accidental even though the man might have died a few minutes later from natural causes if he had not met with the accident."

Completely dispositive and conclusively so of the entire issue of conscious pain and suffering is the decision of this Court in *Hutchison v. Pacific-Atlantic Steamship Co.* (9 Cir 1954) 217 F. 2d 384, handed down on the very day that this case was submitted to the jury.

In that case a seaman disappeared. Six days later his body was found at the bottom of an uncovered and unlighted ventilator shaft.

The autopsy disclosed his death was caused by a fractured skull. The trial Court directed a verdict against the plaintiff on the issue of pain and suffering, holding that the evidence was insufficient to sustain a finding therefor.

Reversing, this Court, speaking through Judge Orr, held that the issue was for the jury, saying:

> "In our view this evidence was sufficient to require submission to the jury of the cause of action for pain and suffering of the deceased. Cf. St. Louis I. M. & S. R. Co. v. Craft, 1915, 237 U.S. 648, 35 S.Ct. 704, 59 L.Ed. 1160. Its weight and credibility was for the jury to consider." (page 385.)

2. Appellant in its brief (pp. 21, 22) speculates as to whether Heavingham could have been killed on impact, etc.

This, as in the case of damages, was not a subject for the appellant to speculate about.

This issue was for the fact-finding body, the jury, to determine. So the United States Supreme Court has held in *Lavender v. Kurn,* supra.

We have a much more precise delineation of fact and circumstance by the proof in this case than was present in *Lavender v. Kurn.* We have an eyewitness and the physical facts to sustain our position. In *Lavender v. Kurn,* a switch tender, while in the performance of his duties, was killed.

His death was due to a fracture of the skull by "some fast-moving small, round object." It was plaintiff's theory that one of the carriers was negligent in permitting a mail hook or other object to

swing out from the side of one of its backing trains and strike the plaintiff, inflicting this injury.

There was evidence that it would be physically and mathematically impossible for this to have occurred. There was some evidence from which it might reasonably be inferred that decedent had been murdered.

Though there was evidence which negatived the hypothesis that decedent had been struck by the mail hook, the Supreme Court concluded that the inference that he was "killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury."

The Supreme Court held the evidence sufficient to make a jury issue and reversed the Supreme Court of Missouri which had held to the contrary.

Completely dispelling any notion that the Supreme Court has, by reason of change of personnel or otherwise, receded from or watered down its views expressed since 1943 in FELA cases—a notion sometimes urged by the defense in these cases and one which seems to pervade appellant's thinking here, are the decisions of that Court previously here reviewed in *Neese v. Southern Railway Company* (1955) 76 S.Ct. 131, in *Snyder v. U. S.* (4 Cir. 1954) (D.C.Md.), 118 F. Supp. 585, 218 F. 2d 266, and *U. S. v. Union Trust Co.* and *Union Trust Co. v. Eastern Air Lines, Inc.* (1953) 113 F. Supp. 80 (D.C. Cir. 1955) 221 F. 2d 62, handed down December 5, 1955; and in the additional decisions of *Swafford v. Atlantic Coast Line Railroad Company* (Oct. 1955) 76 S.Ct. 80, summa-

rily reversing the 5th Circuit Court of Appeals in 220 F. 2d 901 (1955) wherein that Court had reversed the judgment in favor of plaintiff "with directions to enter a judgment for the defendant"; and in *Anderson v. Atlantic Coast Line Railroad Company* and *Atlantic Coast Line Railroad Company v. Anderson* (Oct. 1955) 76 S.Ct. 60 in which the Supreme Court again summarily reversed the decision of the 5th Circuit Court of Appeals in 221 F. 2d 548, wherein that Court had reversed a judgment for the death of a railroad conductor "with directions to enter final judgment for the defendant"; and in *Strickland v. Seaboard Air Line Railroad Company* (1955) 76 S.Ct. 157, reversing the decision of the Supreme Court of Florida in 80 So. 2d 914.

It is of especial interest that the reversal by the Supreme Court was upon the authority of the *Bailey* case. The Per Curiam decision reads:

> "The petition for writ of certiorari is granted and the judgment is reversed. Bailey v. Central Vermont R. Co., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444."

The decisions of the Supreme Court in each case were "Per Curiam. The petition for writ of certiorari is granted and the judgment is reversed."

It is, we think, reasonably clear that appellant is under a gross misapprehension in the premises.

3. It was not reversible error for the Court to submit the issue of conscious pain and suffering to the jury even though it be assumed that such issue was not submissible.

It is settled law in the California courts and in the Federal courts that this is so. Indeed, this defendant, through its present counsel, has in the past been instrumental in making much of the law through asserting abortively the very claims it now makes here.

The general verdict of the jury where there is substantial evidence to sustain it upon any count cannot be impeached upon the ground that there is not evidence to sustain an issue submitted to it.

The cases are of two groups: those relating to the submission of an element of damages and those relating to the submission of an element of negligence.

In both instances the state and federal courts have categorically rejected the contention made by the defendant here.

Twenty years ago this defendant, through its present counsel, urged the precise claim it makes here.

This was in the case of *Walton v. Southern Pacific Co.* (1935) 8 Cal. App. 2d 290, 48 P. 2d 108, cert. den. 296 U.S. 647, 56 S.Ct. 308, 80 L.Ed. 461, rehearing den. 296 U.S. 665, 56 S.Ct. 380, 80 L.Ed. 474.

There this defendant, through its present counsel, sought a reversal in a wrongful death action under the Federal Employers' Liability Act and the Federal Boiler Inspection Act for the death of a railroad employee. The Court there said:

> "It is settled that where suit is brought upon two different theories, if there is evidence suffi-

cient to sustain either of them and the verdict of the jury be a general one, the general verdict will stand, as it imports an implied finding (in a case such as this), that the Boiler Inspection Act was violated in that the engine had a leaky throttle. Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Merrill v. Kohlberg, 29 Cal. App. 382, 155 P. 824; 24 Cal. Jur. 885, 6."

As late as 1950 this same defendant, through the same attorneys, made a like contention in the case of *McNulty v. Southern Pac. Co.* (1950) 96 Cal. App. 2d 841, 216 P. 2d 534. There plaintiff's judgment for $100,000 damages was sustained by the District Court of Appeal and the Supreme Court of California.

This was an action for personal injuries wherein plaintiff was thrown from a train and lost both legs. Plaintiff was 42 years of age and was receiving from his employer, American Trust Company, $365 a month. His employer continued to pay him through his hospitalization and recovery. He was making more money at the time of the trial than he had been at the time of the accident. This appellant, through its present counsel, there contended that the verdict was excessive and the result of caprice (p. 537).

Particularly important and apropos here, however, is the fact that appellant there claimed it was error to refuse to instruct the jury that "there is no evidence in this case that there was any negligence or carelessness on the part of defendant, Southern Pacific Company, in supplying and maintaining sufficient

and adequate lighting facilities at the point of accident."

Rejecting this contention, the Court said (pp. 542, 543):

> "The situation falls squarely within the rule that '* * * a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury * * *. Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues * * *.' 19 Cal. Jur. p. 675."

In *Edgington v. Southern Pac. Co.* (1936) 12 Cal. App. 2d 200, 55 P. 2d 553, it was said:

> "Moreover, the pleadings, the evidence, the instructions proposed by defendant and given by the court, and the interrogatories embodied in the special verdicts, all show that the case was tried upon the theory that all three federal acts were involved; and it is well settled that where an action is based on the alleged violation of several statutes, and a general verdict is rendered in favor of the plaintiff, such verdict will be sustained if it appears that any one of said statutes was violated. Walton v. Southern Pacific Co. (Cal. App.) 48 P. (2d) 108.
>
> The judgment is therefore affirmed."

In *King v. Shumacher* (1939) 32 Cal. App. 2d 172, 89 P. 2d 466, cert. den. 308 U.S. 593, 60 S.Ct. 123, 84 L.Ed. 496, the defendant, unlike the appellant

here, forthrightly admitted that the law was contrary to its contention. The Court said:

> "Defendants (in their supplemental points and authorities) concede that the Walton case 'is squarely against' the position they have taken on this point, but they contend that the portion of the decision above quoted 'is clearly wrong on principle'; and in a later brief they cite cases which they claim support their view. We have found nothing in any of those cases, nor in the arguments advanced by defendants in connection therewith to warrant the conclusion that the doctrine quoted from the Walton case is not the settled law of this state in this class of cases; and the authorities are abundant showing that it is."

It thus appears whether the issues here are regarded as having been stated in one count or in separate counts is immaterial and the rule of law is the same.

In *O'Donnell v. Elgin, J. & E. Ry. Co.* (1949) 338 U.S. 384, 70 S.Ct. 200, the Supreme Court in an opinion by Justice Jackson held that "where the complaint mingled in a single count or cause of action charges of general negligence and a specific charge that defendant 'carelessly and negligently' violated the Safety Appliance Act, 45 U.S.C. § 2, 45 U.S.C.A. § 2, by operating a car not equipped with the prescribed coupler" the *pleading and the proof were sufficient to sustain the resulting judgment on one ground only,* i.e., the violation of the Boiler Inspection Act. The opinion cited in the footnote the following:

"Professor Moore, in discussing this Rule with reference to claims based upon both common law and statutory grounds, states: 'Separate statement by way of counts is not required; separate paragraphing in setting out the grounds in the above actions is desirable and required.' 2 Moore's Federal Practice, 2006-2007 (2 ed. 1948)."

The Federal Court Rule is further stated in the following cases:

Cross v. Ryan (7 Cir. Ill., 1942), 124 F. 2d 883, cert. den. 316 U.S. 682, 62 S.Ct. 1269, 86 L.Ed. 1755;

Miller v. Advance Transp. Co. (7 Cir., Ill., 1942), cert. den. 126 F. 2d 442, 446, 317 U.S. 641, 63 S.Ct. 32, 87 L.Ed. 516;

Larson v. Chicago & N.W.R. Co. (7 Cir., 1948) 171 F. 2d 841, 844.

In *Larson v. Chicago & N.W.R. Co.,* supra, the Court said:

"It also argues that the remaining charge of negligence was based not upon the Federal Empolyers' Liability Act but upon an alleged contract violation which by necessity required allegation and proof of due care on the part of plaintiff. And the point is made that there was neither allegation nor proof. We need not consider the second contention as it is apparent that there was reasonable basis for concluding, in support of the jury's verdict, that defendant was negligent by its act of attaching the pusher engine to the rear of the caboose."

Kinser v. Riss & Co. (7 Cir., 1949), 177 F. 2d 316, 317.

The rule is no different as to damages.

In *Moss v. Coca Cola Bottling Co.,* 103 C.A. 2d 380, 229 Pac. 2d 802, it was held:

> "Defendant contends that the cause of action for breach of warranty is fatally defective in that plaintiff failed to give defendant reasonable notice of the breach. Since we have concluded that there is sufficient evidence to sustain the verdict and judgment for plaintiff on the negligence count, it is unnecessary to discuss the alleged defects in respect of the second count for breach of warranty. As noted above, the jury returned a general verdict for plaintiff. As stated in Shields v. Oxnard Harbor District, 46 Cal. App. 2d 477, 491, 116 P. 2d 121, 130: 'A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict. Hume v. Fresno Irr. Dist., 21 Cal. App. 2d 348, 356, 69 P. 2d 483; King v. Schumacher, 32 Cal. App. 2d 172 (173), 179, 89 P. 2d 466; see also 2 Cal. Jur. (1921) 1029.' "

The rule is no different in respect of an element of damages as compared with an element or charge of negligence.

In *Walling v. Kimball,* 17 Cal. 2d 364, 110 P. 2d 58, it was held:

> "Presumption was that verdict for husband was for general damages for husband's personal injuries alone to exclusion of special damages for expense of treating wife also injured in same automobile collision, particularly where husband's injuries would sustain verdict for amount awarded and verdict for wife would otherwise be excessive under statute to amount of special damages allowed husband."

In *Staub v. Muller* (1936), 7 Cal. 2d 221, 60 P. 2d 283, it was held:

> "Any uncertainty in lump-sum findings of amount of damages will be construed so as to support judgment rather than defeat it."

In *Stewart v. San Fernando Refining Co.* (1937), 22 Cal. App. 2d 661, 71 P. 2d 1118, it was held:

> "On appeal from judgment for plaintiff, reviewing Court would not presume that jury awarded damages as to items which were not supported by a preponderance of evidence in favor of plaintiff."

In direct and categorical rejection of appellant's claim (even assuming there had been no evidence respecting conscious pain and suffering) that the Court erred in failing to give Defendant's Instruction No. 9, "I instruct you that under the evidence in this case you may not include in your award any sum for conscious pain and suffering by the decedent", Appellant's Brief, page 12, is the rule stated in 16 Am. Jur., Death, § 363, page 240, in which it is said:

> "Thus, where the court has fairly and fully given to the jury the general rule as to the measure and elements of damages for wrongful death and the matters proper to be considered, a refusal to charge that in estimating damages the jury should not allow anything for the pain and suffering of the decedent, or as exemplary damages, is not erroneous."

Likewise categorically rejecting its claim respecting submission of the issue is the statement in the same volume of American Jurisprudence under the same subject, Section 364, page 241, in which it is stated:

> "These rules are applicable in regard to an instruction to a jury to allow damages for pain suffered by one killed by another's negligence, if any is shown by the record, although the evidence shows instant death, where there is no evidence of pain and where it must be presumed that the jury did not allow anything for it."

The precise point is covered by the decision of the Supreme Court of California in *Gilmore v. Los Angeles Ry. Corporation* (1930) 211 Cal. 192, 295 Pac. 41, where the action was by the widow to recover for the alleged wrongful death of her husband.

Defendant contended that the deceased was guilty of contributory negligence as a matter of law. Defendant contended (p. 44) that the instructions of the Court submitted to the jury gave "substantial damages to the nonparticipating heirs at law of the decedent" and that this constituted reversible error. Categorically rejecting this contention the Court said:

> "The instructions complained of carried the rights of the widow and children along together but in the disjunctive where necessary for the individual consideration of their claims, and we can see no error in giving them in that form. *If pecuniary loss or loss of support was not shown as to certain of the heirs, it is to be presumed that no award was made in that behalf.* The instructions in mentioning the various heirs, carried their rights together, as above stated, and the words, 'If any', were frequently inserted, thus showing that the court placed before the jury only such matters as the evidence warranted and kept the jury within the proper limits." (p. 45.) (Emphasis ours.)

With respect to appellant's final effort to bolster its position by claims that what is involved here is one of "federal procedure" and that in that connection the decision of *McCandless v. United States* (p. 31 of its Brief) and kindred decisions are applicable, we shall point out that these claims also are without foundation.

Preliminarily, it is difficult to understand how there was a federal procedure peculiar to the points raised by appellant when, as stated in *Toledo, St. L. & W. R. Co. v. Reardon* (1908 Ohio) 159 F. 326, "prior to the rules the form and effect of verdicts in actions at law were matters in which the federal courts followed the procedure of the state courts".

Apparently appellant is unaware of Rules of Civil Procedure, Rule 61 directly applicable to verdicts and to trial Courts. Also, that Rule 61 "should be heeded

by appellate court to be effective", as stated in *University City v. Home Fire Marine Ins. Co.* (8 Cir. 1940) 114 F. 2d 288, and in the light of what is said by Chief Judge Gardner, speaking for the 8th Circuit in *Commercial Credit Corp. v. United States* (8 Cir. 1949) 175 F. 2d 905, 908, that no error is ground for reversal unless it be prejudicial, and stating:

> "Error is not ground for reversal unless it be prejudicial. It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant."

Appellant fails to mention that the *McCandless* case is in conflict and directly contrary to the later decision of the Supreme Court in *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 ALR 719.

In *Kansas City S. R. Co. v. Leslie* (1915) 238 U. S. 599, 35 S. Ct. 844, 59 L. Ed. 1478, a death action under the Federal Employers Liability Act for the loss to the widow and child and also for conscious pain and suffering, the Supreme Court held:

> "It is said the court below erred in approving the charge permitting recovery for pecuniary loss to widow and child and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered, the right to recover for both these reasons in one suit was recently sustained. * * *
>
> "It is further objected that as the declaration set up two distinct and independent liabilities springing from one wrong, but based upon differ-

ent principles, the jury should have been directed to specify in their verdict the amount awarded, if any, in respect of each. This objection must be overruled. Of course, in causes arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing contrary practice in similar proceedings we cannot say that a provision to that effect is necessarily implied. *As the challenged verdict seems in harmony with local practice and has been approved by the courts below, the judgment thereon is not open to attack here upon the ground specified.*" (Emphasis added.)

We respectfully submit that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
December 15, 1955.

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No. 14,813

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

v.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,

Appellee.

Appellant's Reply Brief

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TEXTS

No. 14,813

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

v.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,

Appellee.

Appellant's Reply Brief

I.

SIZE OF VERDICT IS RELEVANT ONLY TO SHOW APPELLANT WAS PREJUDICED BY ERRONEOUS INSTRUCTIONS

The first half of appellee's brief attempts to knock down a straw man of appellee's own creation. It is written as if we had urged as error and as ground for reversal,—which we have not,—that regardless of any other error, the amount of the verdict is excessive. Appellee cites as "dispositive of this appeal" (page 13) some very recent deci-

sions of the United States Supreme Court holding that the Courts of Appeals which sat in the respective cases should not have disturbed the respective District Court judgments for damages as excessive in amount. Appellee has also selected a number of other cases in which singularly large awards were made for personal injuries or death. These selected cases arose in a wide variety of courts, and many of them are not available in published reports (pp. 24-30). Appellee has even sought to bolster his argument against our supposed, non-existent contention by citing hearsay magazine and newspaper articles (pp. 23, 24, 27) which are completely outside the record and which could not have been admitted in evidence for appellee's purposes, even if offered.

The issues on this appeal are stated in the specification of errors in our opening brief (pages 11-12). Only two errors are relied upon: (1) instructing the jury that they could award damages for conscious pain and suffering on the part of appellee's decedent and (2) refusing appellant's request to instruct the jury that they should not include in their award any sum for conscious pain and suffering by the decedent. Exception was taken in the trial court to both the errors specified on the ground that there was no evidence of conscious pain or suffering on which such an award could be based. (Opening brief page 12). Put another way, there are only two questions for decision on this appeal:

1. Is there any evidence in the record sufficient to sustain an award to appellee for conscious pain and suffering of the decedent?

2. If there is no such evidence, did the instruction and the refusal to instruct specified as error so prejudice appellant as to constitute ground for reversal of the judgment below?

The amount of the judgment below, $75,000, is obviously pertinent to the second question.[1]

For example, if the verdict had been for $19,500 (the approximate value, discounted at 4%, of contributions by decedent of $200 per month from the date of his death to a date 10 years later when decedent would have reached the average voluntary retirement age of trainmen, between ages 66 and 67 (R 88-90, 131, opening brief page 11, Appendix),) it might plausibly be argued, to paraphrase *McCandless v. United States,* 298 US 342, 347-348, 80 L ed 1205, 1209 (1936), that it affirmatively appeared from the whole record, including the supposed $19,500 verdict, that the errors in instructions on the issue of conscious pain and suffering were not prejudicial to appellant.

The verdict and judgment below, however, was not for $19,500 but was for $75,000. Appellee says (page 2), "There is no way by which it can be established that the jury allowed *anything* for conscious pain and suffering." The shoe is rather on the other foot. There is no way by which it can be established that the jury did **not** allow a substantial sum to appellee for conscious pain and suffering, and every indication is that it did. Indeed, the purpose —which appellee misconstrues—of our analysis of the amounts which the jury might have awarded appellee for the future contributions by decedent (pages 9-11, 13-18 of our opening brief), was to demonstrate—and it does demonstrate—that there is such a wide margin between the total

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1. This was made clear at the outset of this appeal in the third of the three points upon which appellant stated it intended to rely (R 159):

> "3. The verdict for $75,000 is excessive in that it is apparent from its magnitude that the giving of the instruction erroneously authorizing the jury to consider the issue of conscious pain and suffering by the decedent was prejudicial to the defendant."

award of $75,000 and the various amounts which the jury might have awarded for the only objectively measurable element of damages, the present cash value of financial contributions, that the difference very probably included a substantial sum for conscious pain and suffering. Even this demonstration goes farther than is necessary to establish prejudice from the instructions, for appellant would have been prejudiced by even a substantial **possibility** that damages were awarded for conscious pain and suffering. It is certainly unnecessary, and would be irrelevant, for appellant to show that **even if the jury had been correctly instructed** the amount of the verdict would be so "grossly excessive" or "monstrous" as to warrant reversal by this Court. (See *Southern Pacific Co. v. Guthrie,* 186 F2d 926 (Circ. 9, 1951), cert. den. 341 US 904, 95 L ed 1343.) Yet this is the supposed line of argument at which the first half of appellee's brief is aimed. Reversal for excessiveness of the amount of a verdict returned under **proper** instructions is one thing; reversal of a verdict which, pursuant to **erroneous** instructions, apparently includes "items of claimed damage of which no evidence whatever was produced" is a very different matter. (See excerpt quoted in our opening brief, pages 24-25, from *Southern Pacific Co. v. Guthrie,* supra, at 186 F2d 931 (miscited in opening brief as at 186 F2d 926).)

Appellee, in discussing damages (appellee's brief page 21) expresses agreement with the statement on page 14 of our opening brief, "The cause of action provided by § 1 (45 USCA § 51) is an action only for damages suffered by the designated members of decedent's family, consisting of 'compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.'" Thereafter, on the same page, appellee makes this startling assertion: "Earning

capacity and pecuniary benefits here are synonymous." This last statement is (with deference) absurd. Obviously the damages to the widow and child for the death of a railroad worker who took home $300 per month in earnings and customarily contributed $200 per month for their support would be no different if the deceased worker had instead been paid $600 per month and still contributed only $200 per month for the support of the widow and child. Indeed in the very United States Supreme Court case which is quoted with something of a flourish at the conclusion of appellee's brief (pages 55-56), *Kansas City Southern Ry. Co. v. Leslie,* 238 US 599, 59 L ed 1478 (1915), the Court reversed a judgment for plaintiff in an FELA death action for the benefit of a widow and child on the sole ground that it was error to instruct the jury that they should fix the amount of pecuniary loss to the widow and child by computing what the decedent would have earned had he lived, deducting the personal expenses of the deceased and reducing the remainder to its present value.[2] The Court declared (238 US 604, 59 L ed 1483): "A recovery [for pecuniary damages] by the

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2. The erroneous instruction was as follows (238 US 603-604, 59 L ed. 1482-1483):

> "If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition of labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover if your verdict should be for the plaintiff."

administrator is in trust for designated individuals **and must be based upon their actual pecuniary loss.**[3] [Citing US Sup. Ct. cases]" In other words, earning capacity in itself is of no significance; except as it sets a top limit it is relevant only as one factor or circumstance to be considered in determining the amount that the decedent would have actually paid to or for the benefit of the surviving dependents.

In *Wetherbee v. Elgin, Joliet & Eastern Railway Co.,* 191 F2d 302, 311 (Circ. 7, 1951) (cited on page 15 of our opening brief), where a judgment for plaintiff in a FELA death action was reversed, it was held error to admit an actuary's testimony of the decedent's probable future gross earnings. Referring to the actuary, the court said:

> "His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, **figures or elements which the jury could not use.** The only figure the jury was authorized to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent. The jury was undoubtedly misled by the actuary's figures of $83,761 and $88,652, based on decedent's probable future **gross earnings.** We think the receipt of this testimony over defendant's objections was error."[4]

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3. Emphasis by bold face type, whether within quoted material, or otherwise, is ours throughout.

4. Contrary to appellee's statements (pages 10-11), this holding was not even involved or discussed, let alone ruled upon, in *Miller v. Southern Pacific Company,* 117 CA2d 492, 256 P2d 603, cert. den. 346 US 909, 98 L ed 406. Both the opinion (117 CA2d 508, 256 P2d 612) and the appellant's opening brief in that case (pages 114-115) state flatly that the decedent was earning $4,200 per year, without distinction between gross and take-home pay. The court simply held (as to damages) that taking into account the evidence of contributions, life expectancies, loss by the minor children of care and guidance,

On pages 15 to 20 of appellee's brief there are cited a number of personal injury (not death) cases dealing with the propriety, under the respective circumstances of those cases, of showing the income taxes which the personal injury plaintiffs had been paying on their earnings, as bearing on damages for impairment of those plaintiffs' earning capacities. Appellee has not cited, and we do not know, of any case of a wrongful death action for loss of pecuniary benefits in which it has been held improper to show and consider the amounts of earnings which the decedent actually received in cash, as constituting the fund from which he made cash contributions to his beneficiaries. Since the measure of damages is the loss of pecuniary benefits, the amount of the decedent's past and prospective earnings is not the basis of computation; the significant figures in death cases are the cash contributions, which could only be derived from the decedent's take home pay.

II.

THE RECORD CONTAINS NO EVIDENCE SUFFICIENT TO SUPPORT ANY AWARD FOR CONSCIOUS PAIN AND SUFFERING.

Appellee declares (page 30) that we have omitted from our opening brief references to evidence which would have

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and conscious pain and suffering by the decedent, "the damages fixed herein by the jury and approved by the trial court, when it denied a new trial, are not disproportionate to any reasonable limit of compensation, certainly not so disproportionate as to indicate that the award was the result of passion, prejudice, or corruption on the part of the triers of the facts." This holding is a far cry from the only showing which we are called upon to make as to the amount of the award in the present case—simply that it was sufficiently high that it could have included damages for conscious pain and suffering as to which there was no evidentiary support in the record. Of course the United States Supreme Court's denial of certiorari in *Miller* does not (contrary to appellee's contention, page 11) signify any opinion by the Court on the merits of the case. See *United States v. Shubert,* 348 US 222, 228 n10, 99 L ed 279, 286 n10 (1955).

supported an award for conscious pain and suffering, but in the pages that follow appellee fails to point out any such proof. Appellee refers to photographs showing "the crushed engine cab" (page 31), and "the impact and wreckage of this locomotive and the caboose of the train ahead" (page 40). The only inference which could be supported by evidence that the locomotive cab was in a crushed and wrecked condition is that its occupant, the decedent, must have been rendered unconscious at the time of the impact or almost immediately thereafter and thus insensible to pain and suffering between the time of the accident and the time of death.

Appellee seeks evidentiary support on this issue in the testimony of Maasen, the fireman, that just before the impact, the decedent "stood right in front of me, almost on my feet" and that Maasen was soon thereafter burned by the breaking of a steam pipe before he was knocked out of the window of the cab. The argument is "that if Maasen could be so burned and so survive * * * the deceased could likewise have done so." (page 31)[5]

It will be noted from Maasen's testimony[6] that after the

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5. This argument proves too much; logically it leads to the conclusion that since Maasen did survive, the decedent must be still alive!

6. For the convenience of the court, this portion of Maasen's testimony is here set out in full (R 32-33):

> "So I watched the coupling of the caboose for just about a second, getting closer, and then I got up on my seat box. Mr. Heavingham had come back to my side and stood right in front of me, almost on my feet, and I got up on the seat box to shut the oil valve off at the tank. There is an emergency oil valve cord in the cab of the engine on the fireman's side for just such an occasion, or a brake-into or the engine turning over, that pulling that emergency cord will shut off the oil valve at the tank which would put out the fire in the engine.
>
> "I thought of fire immediately, and I got up on my seat box to reach for that, and at that time, why, we hit the caboose.
>
> "I was facing the—in other words, the back of the engine, my

decedent stood in front of Maasen and before the steam pipe broke in front of Maasen's face, Maasen had climbed up on the seat box, away from decedent, and was facing the rear of the engine at the time of the impact. More significantly, when Maasen was thrown out the window by the impact, he "passed out" and does not even remember hitting the ground. That Maasen at some unspecified time later regained consciousness and made frantic attempts to extricate the decedent from the cab certainly does not lend support to any hypothesis that Maasen would have regained consciousness if he had remained inside the cab, which was rapidly filling with live steam, or that the decedent did or could have been conscious for "an appreciable period of time * * * not as a mere incident of death or substantially contemporaneous with it" (Instruction to Jury, R 149).

Appellee (pages 31-32, 40-41) argues that conscious pain and suffering can be inferred from the fact that Maasen, an experienced fireman, made attempts to remove decedent from the locomotive cab as soon as Maasen had regained consciousness after being thrown out onto the ground. Obviously in such a situation Maasen would make every effort to rescue his fellow worker if he thought that there was the barest possibility of saving the latter's life; it is ridiculous to say that his action represented a carefully considered

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back, was toward the front of the engine reaching for this when it hit, and a steam pipe broke right in front of my face and burned my face quite badly, my eyes and the side of my ears and neck, and at that something else broke loose in there and hit me just a little below the chest and knocked me out the window.

"Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks."

opinion, in the light of his knowledge of railroading, that the decedent was still alive, let alone conscious.

Appellee overlooks the fact that she had the burden of proving not merely that decedent **survived** for an appreciable period of time beyond the accident, but that the decedent remained **conscious**, and so capable of pain and suffering, for an appreciable period. The encyclopedic reference and the two cases cited by appellee (page 34) for the presumption of a continuation of life have no bearing on the issue of consciousness during the period after an accident. The quotation from 15 Cal. Jur. 2d 78, "Death" § 2, is footnoted only to *People v. Feilen,* 58 Cal. 218, holding that in a bigamy prosecution, any presumption that the first wife was alive at the time of the second marriage would be offset by the presumption of innocence of crime, and therefore could not be applied.

In *American Sugar Refining Co. v. Ned,* 209 F2d 636 (Circ. 5, 1954) (appellee's brief, pages 34, 41-42) the issue was whether the decedent had died from an accidental injury suffered in the course of his employment, in which case his surviving beneficiaries would be entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA § 901 ff, or had died of natural causes not connected with his employment. As shown by the excerpts from this case on pages 41-42 of appellee's brief, the court there held that where the decedent had fallen from a barge into the water while alive and his body was found floating in the river several days later, it could not be held as a matter of law that the decedent had died of natural causes before he was drowned and so the finding of the trier of fact below of drowning would not be disturbed.

Occidental Life Insurance Co. v. Thomas, 107 F2d 876 (Circ. 9, 1939) (appellee's brief, page 34) was an action on

a life insurance policy, with double indemnity for death by accident. The decedent insured went fishing in a rowboat on a very deep lake, and neither he nor his body was ever seen again, although the boat was found drifting on the lake. It was held that despite a presumption of continuation of life until the contrary is shown, there was sufficient circumstantial evidence that the insured had met his death by drowning.

To use a presumption of continuation of life to determine how long, for certain legal purposes, a disappeared person will be considered still alive, or to decide whether a man who fell off a barge into the water died of drowning or of natural causes, is a far cry from supplying missing proof of conscious pain and suffering by a "presumption" that the decedent Heavingham remained alive and (necessarily to the argument) conscious "from the time that fireman Maasen last saw him until his death was shown" (appellee's brief page 34). Certainly in *American Sugar Refining Co. v. Ned* it would never have been presumed, had it been relevant, that the decedent there remained alive, or conscious, until "his body was found floating in the river several days later" (209 F2d 637, quoted in appellee's brief page 42). Without repeating it here, we respectfully refer the court to the discussion in our opening brief, pages 18-22, of authorities which establish that to recover for conscious pain and suffering of a decedent under § 9 of the FELA (45 USCA § 59) plaintiff must affirmatively prove a substantial period, not merely contemporaneous with death, of (1) continuation of life, (2) injuries conducive to suffering and (3) continuation of consciousness.[7]

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7. The inapplicability of appellee's argument may be further demonstrated by applying the holding in *American Sugar Refining Co. v. Ned*, 209 F2d 636 (Circ. 5, 1954), the only case cited by appellee in which a presumption of continuation of life was applied in

Appellee cites a number of authorities (pages 35 to 38) for the admissibility of a death certificate as evidence of the facts stated in it, most of which deal with the use of a death certificate in determining whether a decedent committed suicide. These authorities are beside the point. We do not question that the death certificate admitted below as plaintiff's exhibit 26 (R 121) was competent, under the state and federal statutes (California Health and Safety Code § 10551, 28 USCA § 1732) as evidence of the facts stated in it, but we reiterate our position taken below (R 114) and in our opening brief (page 22) that the facts stated in the death certificate, including the statement that decedent's death was caused by scalding burns over the entire body, are without probative value because of a complete lack of any independent evidence of continued consciousness, or even survival, beyond the time of impact, especially in the face of the statements in the certificate **that the accident and the decedent's death both occurred at the same minute and hour of the same day.**

But, says appellee, affirmative proof of a substantial period of conscious pain and suffering was not required because the jury was entitled to conclude from speculation and conjecture that there was conscious pain and suffering; and for this proposition appellee cites *Lavender v. Kurn,*

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support of the holding, to the facts in *Cleveland Tankers, Inc. v. Tierney,* 169 F2d 622, (Circ. 6, 1948) (cited in our opening brief, page 21), where the record was said to be devoid of evidence of conscious pain and suffering on the part of members of the crew of a barge which was lost in a storm on Lake Erie. If the appealing barge owner, Cleveland Tankers, Inc., had contended that one or more of the crew members had died of natural causes, unconnected with the sinking, he might well have been met with the presumption invoked in *American Sugar Refining Co. v. Ned* that the seamen remained alive until they drowned, but certainly no presumption was available to the death claimants to replace affirmative proof of conscious pain and suffering.

327 US 645, 90 L ed. 916 (1946) (appellee's brief pages 35-36, 43-44). In that case the principal factual issue was whether the decedent had been killed by a blow on the head from a mail hook projecting from the side of a moving railroad car. There were precise physical facts in evidence, pertaining to the vertical and horizontal position of the mail hook, the location and height of the ground on which the decedent could have been standing, the decedent's height, etc., which, if believed by the jury, would have established that the decedent did meet his death in that way. In this context the passage from the opinion extracted by appellee (pages 35-36) gives no support to appellee's position here. The Court said (327 US 653, 90 L ed. 923):

> "Whatever facts are in dispute or the evidence is **such that fair-minded men may draw different inferences,** a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by **choosing** what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Applied here, this opinion means that if there were facts in evidence which would affirmatively establish an appreciable period of conscious pain and suffering, the jury would be free to disregard conflicting evidence. But since "there is a complete absence of probative facts to support" any award for conscious pain and suffering, it was error not to withdraw that issue from the jury.

Two cases, cited by appellee as sustaining awards for conscious pain and suffering, are readily distinguishable. The excerpt quoted by appellee (page 33) from *Giles v. Chi-*

cago Great Western Railway Co., 72 F Supp. 493 (D. Minn. 1947) shows that in that case there was ample evidence of prolonged conscious pain and suffering, beginning with the decedent's crawling through the cab window and walking a considerable distance in deep snow while suffering from severe and extensive burns. In *Hutchison v. Pacific-Atlantic Steamship Co.,* 217 F2d 384 (Circ. 9, 1954) (appellee's brief pages 42-43) there was positive testimony by a physician that the decedent did not die instantly but probably survived his fall by a period of hours, that there was a period of consciousness in which pain was suffered, and that such a period of conscious pain was typical of the injury which caused the decedent's death. Of course, no such affirmative evidence was presented in the case at bar.

III.

REVERSIBLE ERROR RESULTED FROM THE INSTRUCTION AUTHORIZING THE JURY TO AWARD DAMAGES FOR CONSCIOUS PAIN AND SUFFERING AND FROM THE REFUSAL TO INSTRUCT THAT NO SUCH AWARD COULD BE MADE.

A. Federal Law Determines Whether an Error Is Ground for Reversal.

To support the final contention in appellee's brief, that "it was not reversible error for the Court to submit the issue of conscious pain and suffering to the jury * * *", appellee cites cases from California state appellate courts (pages 46-49, 51-52), quotations from American Jurisprudence which are footnoted only to cases from state courts (pages 52-53) and some cases from federal appellate courts. The judgment now before this Court for review is a judgment rendered by a United States District Court in an action grounded entirely upon a federal statute, the Federal Employers' Liability Act (45 USCA § 51 ff). Decisions

and rules announced by the state courts of California and other states governing what errors in the trial courts of those states will constitute ground for reversal upon appeal to the appellate courts of those states have absolutely no bearing upon a determination by a federal appellate court of whether an error committed by a federal district court in an action under a federal statute is prejudicial and reversible. As we have pointed out at length in our opening brief (pages 29-30) the old "Conformity Act," which once required that federal district courts apply certain local state court rules of procedure in their trial practice, has been repealed and in any event never applied to federal appellate proceedings, which "are governed entirely by the acts of Congress, the common law, and the ancient English statutes." (*Camp v. Gress,* 250 US 308, 318, 63 L ed 997, 1003 (1918).) In one of the very California cases cited by appellee (pages 48-49) as holding certain errors to be harmless, *King v. Schumacher,* 32 CA2d 172, 89 P2d 466, cert. den. 308 US 593, 84 L ed 496, the California District Court of Appeal clearly recognized that its holding as to what error would be ground for reversal would have no application in the federal courts. The opinion cited was on rehearing after an earlier decision reported in 81 P2d 999. In the earlier decision the Court had ordered a judgment for plaintiff in an FELA action reversed for failure to instruct the jury that the evidence was insufficient to support a finding for plaintiff upon one of the two charges of negligence asserted, even though there was sufficient evidence to support the other charge of negligence. It was stated that this holding was in accordance with well settled federal practice, citing *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed 701 (our opening brief p. 25) and *Chicago, St. Paul M. & O. R. Co. v. Kroloff,* 217 Fed. 525 (Circ. 8) (our opening brief

p. 27).[8] On rehearing the same court held that even though the error would be reversible under the federal cases, the question of whether an error is ground for reversal is a procedural question governed by the law of the forum and that it was bound by earlier state court cases, particularly *Walton v. Southern Pacific Company,* 8 CA2d 290, 48 P2d 108, to hold that the error was harmless and to affirm the judgment.[9]

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8. "* * * we are satisfied that defendants' request, that the jury be charged that the evidence was insufficient to warrant a finding against them on the issue mentioned, should have been granted. That such a refusal would constitute prejudicial error under the federal practice appears well settled (*Wilmington Star Mining Co. v. Fulton,* 205 U.S. 60, 27 S. Ct. 412, 51 L. Ed. 708; *Chicago, St. Paul M. & O. R. Co. v. Kroloff,* 8 Cir., 217 F. 525), the reasons being, as stated in the case last cited, a presumption of prejudice from error, and that the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict. Although the presumption no longer obtains in our jurisdiction (Constitution, California, Art. 6, sec. 4½), nevertheless as in *Barrett v. Southern Pacific Co.,* 207 Cal. 154, 277 P. 481, it is not possible to determine from the record upon which of the two issues the jury found the defendants guilty of negligence. As the court there said (page 486): 'Some of them may have found against the defendant on the one and erroneous theory, and the remaining jurors may have reached the same conclusion on the other theory.' We think, as was the court's opinion in the *Barrett Case,* that the error was prejudicial to a degree which reasonably supports the conclusion that the result was a miscarriage of justice.

"The judgment is reversed." (81 P2d 1002)

9. "Defendants make the further point that even though the law of this state is as stated in the decision in the *Walton* case, it is contrary to the doctrine of reversal followed in like cases in the federal jurisdiction, and that this being an action based on a federal statute, the rule of the federal courts is controlling. In opposition to this view, plaintiff cites certain cases which he contends demonstrate that no substantial conflict exists between the doctrines of the two jurisdictions. But whether or not such conflict does exist is not important, for the reason that it is well settled in both the federal and state jurisdictions, and the parties herein agree, that where as here an action founded on a federal statute is properly brought in the state courts, the law of the state, in the absence of any contrary provisions in the federal statute (and here there are none), is controlling in all matters of practice and procedure; and manifestly the process of determining

The only federal case which we have found agreeing with appellee that a federal appellate court must follow state

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on appeal whether error was committed by the trial court during the trial of the cause and if so whether such error is prejudicial and therefore constitutes ground for reversal, is a matter of practice and procedure. Referring to the judicial construction given those terms as they are used in the law, it has been said that together and in a larger sense they include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right (*Duggan v. Ogden*, 278 Mass. 432 [180 N. E. 301, 82 A. L. R. 765] ; Anderson's Law Dictionary) ; whereas, singly, the word 'procedure' has been defined as the machinery for carrying on the suit, including pleading, process, evidence and practice, whether in the trial court or the appellate court, or in the processses by which causes are carried to the appellate court for review, or laying the foundation for such review (*Jones v. Erie R. Co.*, 106 Ohio, 408 [140 N. E. 366]), and the word 'practice' is said to be the form, manner or order of instituting or conducting a suit or other judicial proceeding through its successive stages to the end in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts. (Black's Law Dictionary, citing among other cases *People v. Central Pac. R. R. Co.*, 83 Cal. 393 [23 Pac. 303], and *Kring v. Missouri*, 107 U. S. 221 [2 Sup. Ct. 443, 27 L. Ed. 506].) Here, admittedly the enforcement of the legal rights given and declared by said federal act is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. (*Taylor v. Southern Ry. Co.*, 350 Ill. 139 [182 N. E. 805].) It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court. Moreover, a number of adjudicated cases might be cited in support of the conclusion reached herein. For example, the law of the forum has been held controlling with respect to nonunanimous verdicts (*Minneapolis & St. Louis R. R. v. Bombolis*, 241 U.S. 211 [36 Sup. Ct. 595, 60 L. Ed. 961] ; *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260 [148 N. W. 106] ; see, also, cases cited in 12 A.L.R. note XI, p. 713) ; and as to the submission of a cause on special verdicts (*Chesapeake & O. Ry. Co. v. Meadows*, 119 Va. 33 [89 S. E. 244] ; *Kansas City So. Ry. Co. v. Leslie*, 238 U. S. 599 [35 Sup. Ct. 844, 59 L. Ed. 1478] ; *Union Pac. R. R. Co. v. Hadley*, 246 U. S. 330 [38 Sup. Ct. 318, 62 L. Ed. 751]) ; also as to the matter of directing a verdict (*Brenizer v. Nashville, C. & St. L. Ry.*, 156 Tenn. 479 [3 S. W. (2d) 1053, 8 S. W. (2d) 1099] ; *Dutton v. Atlantic Coast Line R. Co.*, 104 S. C. 16 [88 S. E. 263]) ; and the entry of judgment *non obstante verdicto* (*Marshall v. Chicago, R. I. & P. Ry. Co.*, 133 Minn. 460 [157 N. W. 638] ; *Robertson v. Chicago, R. I. & P. Ry. Co.*, 180 Minn. 578 [230 N. W. 585].)'' (32 CA2d 181-182, 89 P2d 471-472)

law in determining whether an error committed by a federal trial court in trying a federal cause of action is ground for reversal is *Stephenson v. Grand Trunk Western Railroad,* 110 F2d 401 (Circ. 7, 1940), which we fully discussed and distinguished on pages 29-30 of our opening brief. Certainly *Toledo, St. L. & W. R. Co. v. Reardon,* 159 Fed. 366, (Circ. 6, 1908) cited by appellee (page 54) does not hold that state law is applicable.[10] Appellee italicizes (p. 56) language from *Kansas City S. R. Co. v. Leslie,* 238 US 599, 59 L ed. 1478 (1915) to the effect that a judgment on a verdict was not open to attack upon a ground specified "as the challenged verdict seems in harmony with local practice and has been approved by the courts below." Appellee fails to point out that that case came to the United States Supreme Court from the Supreme Court of the State of Arkansas, which in turn had reviewed the judgment of the Circuit Court of Little River County, Arkansas, so that of course

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10. Appellee cites this case as appearing on page 366 of 159 Federal Reporter, but apparently refers to the opinion beginning on page 366 of that volume. The language quoted by appellee does not appear in that opinion. The holding rather is that state rules as to the form of verdict are not controlling in the federal court:

> "During the argument before the jury counsel for defendant requested the court to submit to the jury in connection with the main issue certain special interrogatories in regard to particular facts, for special findings. The court denied the request, assigning as a reason that they had not been filed until during the argument to the jury. And counsel refer to a statute and decisions thereon of the courts of Ohio to the effect that such requests may be submitted at any time before the case is submitted to the jury. **But the law of the state does not control the federal courts in respect to the mode in which causes shall be submitted to a jury.** Nudd v. Burrows, 91 U. S. 441, 23 L. Ed. 286. Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Lincoln v. Power, 151 U. S. 443, 14 Sup. Ct. 387, 38 L. Ed. 224. It was a matter entirely within the discretion of the court whether it would submit the special questions for separate findings, and its action therein cannot be assigned as error." (159 Fed. 368)

the form of the verdict was governed by the law of the Arkansas court.[11]

B. The Errors Specified by Appellants Are Grounds for Reversal.

In our opening brief (pages 23-32) we reviewed the federal cases on the question of whether or not an error by a United States District Court in submitting to, or refusing to withdraw from, the jury a claim of liability or damages not supported by evidence is prejudicial and reversible error. With one distinguishable exception (opening brief pages 29-30), these cases hold that such error is prejudicial and reversible. The basic "well-settled rule" is "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (*McCandless v. United States,* 298 US 342, 347-348, 80 L ed. 1205, 1209 (1936). See our opening brief pages 31-32.) This rule in no way conflicts (as appellee asserts, page 55) with *Palmer v. Hoffman,* 318 US 109, 87 L ed. 645 (1943), which merely applies the corollary that "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court."[12] Whatever may be said of the errors specified here,

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11. It will be noted that in this case the United States Supreme court reversed a judgment for plaintiff (see p. 24 below) for error in giving an instruction which closely coincides with appellee's position as to the measure of damages (see pp. 5-6 above).

12. The pertinent holding is as follows (318 US 116, 87 L ed. 651):

> "One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See Edison Electric Light Co. v. United States Electric Lighting Co. (CC) 45 F 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was

they certainly affect the substantial rights of appellant. Indeed the effect of the errors was to submit to the jury **an entire cause of action,** separate from appellee's other claims, which was entirely unsupported by evidence.[13]

In *O'Donnell v. Elgin, Joliet & Eastern Railway Co.,* 338 US 384, 94 L ed. 187 (1949) cited by appellee (page 49), a judgment for the defendant railroad was **reversed** for **error in the instructions.** It was held

> "that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." (338 US 394, 94 L ed. 194)

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reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat 1181, c 48, 28 USCA § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."

13. Appellee's cause of action for pecuniary loss to the decedent's widow (appellee) and dependent child arises under § 1 of the FELA (45 USCA § 51), which was enacted as part of the original Act in 1908. If appellee had a cause of action for conscious pain and suffering by the decedent (which she did not prove), it would necessarily be based on § 9 (45 USCA § 59), which was added to the Act two years later, in 1910. These two causes of action, or claims for relief, are separate and distinct from one another. (*St. Louis, Iron Mountain and Southern Ry. Co. v. Craft,* 237 US 648, 656-658, 59 L ed 1160, 1163-1164 (1914). See our opening brief, pages 13-14, 30.)

The holding to which appellee refers in this case was that the form of the complaint, (which mingled in a single count charges of general negligence and of violation of the Safety Appliance Act), though disapproved, did not under the circumstances disentitle plaintiff to the prescribed instruction. This decision is very different from saying that a judgment for plaintiff would have been affirmed if there had been submitted to the jury a claim which was not supported by evidence.

Appellee says (page 54) that "apparently appellant is unaware of Rules of Civil Procedure, Rule 61[14] directly applicable to verdicts and to trial courts." This rule is, of course, the counterpart at the trial level of 28 USCA § 2111 (discussed in our opening brief pages 31-32) governing what constitutes harmless error for purposes of appellate review. The note of the Advisory Committee on Rule 61, interestingly enough, refers not only to 28 USCA § 2111, but also to *McCandless v. United States,* from which we have quoted (see page 19 above) the basic rule "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

Neither of the cases cited by appellee (page 55) as construing Rule 61 modify the basic principle announced in *McCandless.* In *University City, Mo. v. Home Fire & Marine Insurance Co.,* 114 F2d 288 (Circ. 8, 1940) the ap-

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14. "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

pellant was held entitled to a **reversal** for **prejudicial error** in the admission of evidence adverse to appellant.[15]

In *Commercial Credit Corp. v. United States,* 175 F2d 905 (Circ. 8, 1949), the appeal was taken from the denial of a motion which was designed to cure the appellant's previous failure to take a timely appeal. Referring to this ruling of the trial court, the court said (175 F2d 907-908):

> "Under the undisputed facts and circumstances disclosed by the record we are of the view that it was an abuse of discretion to deny claimant's motion.
>
> "It is therefore necessary to consider whether the procedural error was prejudicial to the substantial rights of claimant and that leads us to a consideration of the second ground urged for reversal. Error is not ground for reversal unless it be prejudicial. It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant."

The court then went on to consider the "second ground urged for reversal", (that the findings of fact, conclusions

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15. After quoting Rule 61, the Court said (114 F2d 295):
"This rule is intended for the guidance of the district court, but it should be heeded by the appellate court to make it effective.
"Section 391, Title 28 USCA, Judicial Code § 269, [now 28 USCA § 2111,] provides that 'On the hearing of any appeal * * * in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This section of the statute was included in the Act of February 26, 1919, 40 Stat. 1181. Speaking of the purpose of the statute, the Supreme Court said in Bruno v. United States, 308 U. S. 287, 294, 60 S. Ct. 198, 200, 84 L. Ed. 257, that 'that Act was intended to prevent matters concerned with the **mere etiquette of trials** and with the **formalities and minutiae of procedure** from touching the merits of a verdict.' Neither this statute nor Rule 61, supra, were intended to deprive a litigant of a **substantial right** in the trial of a case, civil or criminal."

of law and judgment were not sustained by the evidence and were contrary to law), held against appellant on the merits and affirmed the judgment.

On page 50 of appellee's brief, in the section dealing with whether the errors specified by appellant are ground for reversal, there are cited four cases, all from the United States Court of Appeals for the Seventh Circuit, which are said to state the (unspecified) "Federal Court Rule". That Court decided *Stephenson v. Grand Trunk Western Railroad Co.,* 110 F2d 401 which, as we stated in our opening brief, is the only federal appellate case which we have found contrary to *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed. 708, and which we have shown to be unsound (opening brief, pages 29-30). Although all of these four cases[16] were decided subsequently to *Stephenson,* none of them cites *Stephenson* because none of them involves the same issue. These cases merely hold that where two or more charges of negligence (or other grounds of liability) are made in the complaint, and one or more charge is supported by evidence, the defendant is not in those circumstances **alone** entitled to a directed verdict or a new trial or similar relief simply because certain other charges alleged were not supported by evidence. In *Larsen v. Chicago & N.W.R. Co.,* 171 F2d 841, the jury answered special interrogatories to the effect that the defendant had been negligent in two separate respects. Obviously the judgment for plaintiff had to be affirmed if either of the two charges on which the jury had found against defendant were supported by evidence because the jury had manifested the grounds on which the verdict for plaintiff was based. In the other three cases,

16. *Cross v. Ryan,* 124 F2d 883, cert. den. 316 US 682, 86 L ed. 1755; *Miller v. Advance Transp. Co.,* 126 F2d 442, 446, cert. den., 317 US 641, 87 L ed. 516; *Larsen v. Chicago & N.W.R. Co.,* 171 F2d 841, 844; *Kinser v. Riss & Co.,* 177 F2d 316, 317.

where several grounds of liability had been submitted to the jury, the defendants contended on appeal that the evidence was insufficient to support the general verdicts for plaintiff. None of these defendants, so far as appears, had excepted to the submission of the particular issues to the jury or to the refusal of the trial court to withdraw particular issues from the jury. The prejudicial effect of errors in instructions such as those committed here was therefore not considered at all in those cases.

We close this final portion of our reply brief, as appellee has closed her brief (pages 55-56) with still another reference to *Kansas City S.R. Co. v. Leslie,* 238 US 599, 59 L ed. 1478 (1915). That was an FELA death action, arising in an Arkansas state court, in which a judgment of $18,000 for pecuniary loss to a wife and young child and for conscious pain and suffering by the deceased had been affirmed by the Supreme Court of Arkansas. The United States Supreme Court reversed this judgment on the sole ground that the jury had been erroneously instructed on the measure of damages (see page 5 and footnote 2 above) "and the probable result was materially to prejudice plaintiff in error's rights." (238 US 604, 59 L ed. 1483) If the plaintiff in error (defendant below) in that case was prejudiced and entitled to reversal of an adverse judgment because of an instruction erroneously prescribing the measure of an admitted element of damage, surely appellant here was prejudiced and is entitled to a reversal of the judgment below for error in submitting to the jury a complete and separate element of damage—or more correctly, a complete and separate cause of action under a distinct section of the federal statute.

CONCLUSION

Appellee has not pointed out any evidence in the record sufficient to sustain an award of damages for conscious pain and suffering, and, despite lengthy, irrelevant argument that the amount of the judgment below was in itself not excessive, appellee has failed to show that the verdict did not or could not have included such an award. Under the law governing review of judgments of United States District Courts in actions based on federal statutes, it was prejudicial error to submit the issue of conscious pain and suffering to the jury. It is respectfully submitted that the judgment below should be reversed.

Dated: January 17, 1956

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Attorneys for Appellant

No. 14,814

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE RALPH JAMES, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

On December 21, 1954, Abner Mack Taylor saw a light in a house located on Lisga Street in the Town

of Fairbanks, Alaska. He went to his friend, Climie Flenaugh, the owner, and inquired whether the house had been rented.

After receiving a negative answer to the inquiry, he, accompanied by Mr. Flenaugh, proceeded back to the house. There both men saw the appellant come out to the storm porch. Mr. Flenaugh saw the appellant drop the parkas. The appellant then turned around and started knocking on the door. The two witnesses for the appellee observed tracks in the snow leading into the house from the street. Upon entering the house they observed footprints which led to the back room where three parkas had been placed previously.

On December 13, 1954, the door had been locked and the three parkas, the personal property of Climie Flenaugh, were inside the house in the back room. The three parkas lying in the storm porch had no snow on them. Light snow had fallen from 3:33 o'clock in the afternoon until 8:35 o'clock in the evening.

Mr. Wirth, the Fairbanks city police investigator, discovered that the stripping along the door had been pried loose and some thin instrument had been used to force back the lock. When the appellant was searched a pocketknife, flashlight and wallet were found in his possession.

Appellant testified that he went to the house to see some girls and denied having entered the house. He was found guilty of burglary in a dwelling house and

sentenced to imprisonment for a period of eighteen months.

ARGUMENT.

A VACANT HOUSE CAN BE A "DWELLING HOUSE" WITHIN THE ALASKA BURGLARY STATUTE.

Whether the house owned by Mr. Flenaugh can be a dwelling house within the definition of Section 65-5-35 of the Alaska Compiled Laws Annotated, 1949, is the only question raised by the appellant. The fact that the house was vacant and the last tenant did not intend to return to it is not disputed.

However, the Alaska burglary statute, Section 65-5-31 of the Alaska Compiled Laws Annotated, 1949, is not declaratory of the common law. Burglary at common law was considered a crime against habitation. The Alaska Legislature did not follow the common law rule, because in the criminal code of the Compiled Laws of Alaska, 1913, burglary was set forth under Chapter Three as an offense against property. "Burglary of an unoccupied dwelling house is not an offense against habitable security, but is a crime against property, * * *", *Sloan v. People,* 176 Pac. 481, 482 (1918).

Although no record is available to assist this Court in ascertaining the intent of the Legislature, a reasonable explanation exists for making burglary an offense against property instead of the habitation. Mining was the industry in Alaska at the time this statute was enacted. The miners stayed in their cabins along

the creeks until fall, then they went to spend the winter at certain localized points.

Section 65-5-35 of the Alaska Compiled Laws Annotated, 1949, provides that any building is deemed a "dwelling house" within the meaning of the sections of this Act defining the crime of burglary any part of which has usually been occupied by any person lodging therein * * *

A search of the statutes and authorities that are available in our library has failed to disclose another jurisdiction with a definition as set forth in Section 65-5-35. Since the Legislature has classified burglary as a crime against property, the cases following the common law cited by the appellant are not in point.

Although the definition is a compromise between those cases and the Court's decision in *Commonwealth v. Woolfolk,* 121 Ky. 167, 89 S.W. 110, 111 (1905), which held:

> "The term 'dwelling house' is therefore one of differentiation, a name which distinguishes it from every other house or class. To constitute a building a dwelling house, it is not necessary that it be occupied as a place of residence by a family or person. If constructed for use as a place of residence by a family or person, it is a dwelling house even in the process of erection, and is known as and called a 'dwelling house.' The same is true of a dwelling house that becomes for a time vacant after being occupied by a family or person as a place of residence. Having been designed for and used as a dwelling house, it remains a dwelling house, though temporarily unoccupied, until converted to some other use."

This definition of a dwelling house was followed in *Thomas v. Commonwealth,* 150 S.W. 376, 377 (1912).

The record discloses that Mr. Flenaugh's house has usually been occupied when any person lodged therein. After he purchased it in 1952, a family rented the house for six or seven months. (TR 49.) Then, two women rented the house which was furnished enough that they could cook their meals there. (TR 27.) Mr. Wirth observed a kitchen stove and two beds in different rooms. (TR 64.) The appellant even considered this house to be a dwelling house as shown by his testimony. (TR 74.)

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,
September 20, 1956.

Respectfully submitted,
GEORGE M. YEAGER,
United States Attorney,
Attorney for Appellee.

(Appendix Follows.)

Appendix.

Appendix

ALASKA COMPILED LAWS ANNOTATED, 1949.

65-5-31. *Burglary in dwelling house:* If any person shall break and enter any dwelling house with intent to commit a crime therein, or, having entered with such intent, shall break any such dwelling house or be armed with a dangerous weapon therein, or assault any person lawfully therein, such person shall be deemed guilty of burglary, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; provided, however, if said burglary be committed at night time the maximum penalty shall be fifteen years and provided further that if a human being be within the dwelling at the time of said burglary, either night time or day time, the maximum penalty shall be twenty years.

65-5-35. *"Dwelling house" defined:* That any building is deemed a "dwelling house" within the meaning of the sections of this Act defining the crime of burglary any part of which has usually been occupied by any person lodging therein, and any structure joined to or immediately connected with such building.